82-1196
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GERTRUDE BARNSTONE and HARVEY MALYN,

Petitioners

V.

UNIVERSITY OF HOUSTON, KUHT-TV,
and
PATRICK J. NICHOLSON,

Respondents

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUT

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January 10, 1983

Gertrude BARNSTONE, and Harvey

Malyn, Plaintiffs,

v.

The UNIVERSITY OF HOUSTON, KUHT-TV, and Patrick J. Nicholson, in his individual and representative capacity as University of Houston Systems Vice President, Defendants.

Civ. A. No. H-80-1048.

United States District Court,

S. D. Texas,

Houston Division.

Dec. 18, 1980.

MEMORANDUM AND ORDER

MCDONALD, DISTRICT JUDGE.

INTRODUCTION

This action challenges the decision of the University of Houston not to air the controversial program, "Death of a Princess," as previously scheduled on its public television station, KUHT-TV. The plaintiffs contend that the decision by Dr. Patrick J. Nicholson, Vice President for Public Information and University Relations of the University of Houston, not to telecast "Death of a Princess" on KUHT-TV, the public television station owned and operated by the University, on Monday, May 12, 1980, at 8:00 p.m., deprived them of their constitutional rights under the First and Fourteenth Amendments. The defendants, Dr. Nicholson, the University of Houston, and KUHT-TV, deny that the plaintiffs' constitutional rights were violated and raise several procedural objections.

The present case was originally filed by plaintiff Gertrude Barnstone on Thursday, May 8, 1980. The following day, May 9, 1980, after a full hearing in which all the parties were ably represented, the Court granted the plaintiff's request for a temporary restraining order. A written order was entered, supplemented the morning of May 12, 1980, compelling the defendents to telecast "Death of a Princess" at its originally scheduled time and date. On the afternoon of May 12, 1980, the date that "Death of a Princess" was originally scheduled and subsequently ordered to be shown by this Court, the United States Court of Appeals for the Fifth Circuit, on the "condition that the Defendants...tape and preserve the program in issue herein," vacated the temporary restraining order entered by this Court. The University of Houston v. Barnstone, No. 80-1527 (5th Cir. May 12, 1980). That evening, prior to 8:00

p.m., United States Supreme Court Justice Powell, Circuit Justice for the Fifth Circuit, denied the plaintiff's motion to stay the order entered by the Fifth Circuit. Barnstone v. University of Houston, 446 U.S. 1318, 100 S.Ct. 2144, 64 L.Ed.2d 488 (1980). Thus, in accordance with Dr. Nicholson's earlier decision, "Death of a Princess" was not shown on KUHT-TV, although it was taped and preserved as directed by the Fifth Circuit.

Both the plaintiff and the defendants subsequently moved for summary judgment. The voluminous memoranda filed by the parties were supplemented by an equally extensive brief filed by the Public Broadcasting Service, which was granted leave by this Court to participate as amicus curiae. The Public Broadcasting Service (PBS), of which KUHT-TV is a member, distributed "Death of a Princess." Because significant material facts were still in dispute, see Fed.R.Civ.

P. 56(c), and because the Fifth Circuit's action of May 12, 1980, was viewed by the Court as conveying the desirability of the development of a full factual record, the motions for summary judgment were denied. Harvey A. Malyn was granted leave to join this action as a party-plaintiff and trial was set for August 19, 1980.

The trial and oral arguments took the better part of three full days, concluding late in the afternoon on August 21, 1980. Since that time, supplemental memoranda have been filed by both sides. The Court has now had an opportunity to fully review the facts, the law, and the arguments of the parties. In accordance with that review, it finds that the decision not to show "Death of a Princess" on KUHT-TV at 8:00 p.m. on May 12, 1980, deprived plaintiffs Barnstone and Malyn of the rights guaranteed to them by the First and Fourteeth Amendments to the Constitution of the United States.

THE FACTUAL SETTING

The University of Houston is a co-educational institution of higher learning operating under the authority of Texas law. See Tex.Educ.Code Ann. §§ 111.01 et seq. (Vernon). The control of the University is vested in a Board of Regents, id at § 111.11, whose members are appointed by the Governor with the advice and consent of the Senate. Id at § 111.12. Approximately 50 percent of the University's operating budget comes directly from the State of Texas' general revenue funds.

One of the activities conducted by the University of Houston is the operation of KUHT-TV, a noncommercial educational television station licensed to it by the Federal Communications Commission under the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., as amended. KUHT-TV obtains its power from the University of Houston and is housed in a building maintained by the

University and located on the campus. Approximately 60 percent of KUHT-TV's annual budget of $2.7 million dollars in the coming year consists of public funds from the Association for Community Television (ACT). About 12 percent of its budget is derived from state funds obtained from the Gulf Regional Educational Television Affiliate (GRETA) for the broadcasting services provided to local school districts during the school year. The remainder of its funds come from federal community service grants. The parties have stipulated that both the University of Houston and KUHT-TV constitute "governmental entities" for the purpose of First Amendment analysis. See Columbia Broadcasting System v. Democratic National Committee, 412 U.S.94, 93 S.Ct. 2080, 36 L. Ed.2d 772 (1973) (hereinafter referred to as CBS v. DNC).

As a member of PBS, KUHT-TV participates in the Station Program Cooperative

(SPC). This program, described as a "unique concept in program selection and financing for public television stations," Accuracy in Media, Inc. v. Federal Communications Commission, 521 F.2d 288, 292 n.14 (D.C.Cir.1975), was introduced to give local public television stations more control over the content of the programs shown in the national public television broadcasting system. Blakely, To Serve the Public Interest 206 (1979). The SPC works in the following manner. Producers or production companies that have a program or series they want to offer to a public television station contact PBS. They advise PBS what the program or series is about and the price the station must pay to obtain the rights to broadcast it. PBS then makes a catalogue, summarizing this information, which it distributes to its member stations. By negative or affirmative vote, each station indicates whether it is willing to pay its portion of

the cost of purchasing the rights to broadcast the program or series. If enough stations vote to share the costs, PBS purchases the rights to broadcast the program or series, schedules it, publicizes it, and distributes it to its member stations for broadcasting. The stations that refuse to contribute to the costs of purchasing the rights to the program or series are prohibited from televising it. The stations that agree to share the costs of obtaining the rights to the program or series are free to broadcast or not broadcast the project as they wish. See, Memorandum of Amicus Public Broadcasting Service in Support of Defendants, at 3 (hereinafter referred to as Brief of PBS); The Broadcast Industry 203 (R. Stanley, ed. 1975); Accuracy in Media, supra.

This latter provision, e.g., that stations which voted and paid to obtain the show are still free to refuse to show it,

stems not only from PBS's "Station User's Agreement," Brief of PBS, at 4, but from the regulatory structure established by Congress in the Communications Act of 1934 and the Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-399, since amended. See CBS v. DNC, supra, 412 U.S. at 116, 93 S.Ct. at 2093; Federal Communications Commission v. Midwest Video Corporation, 440 U.S. 689, 704-705, 99 S.Ct. 1435, 1443-1444, 59 L.Ed. 2d 692 (1979); S.Rep.No.222, 90th Cong., 1st Sess. 14-14, reprinted in [1967] U.S. Code Cong. & Ad.News 1772, 1794. See also 47 C.F.R. § 73.658(e).

Sometime prior to May, 1980, PBS sent PBS sent an SPC catalogue to KUHT-TV. After reviewing the catalogue, KUHT-TV, by affirmative vote, like 144 other public television licensees, agreed to share in the costs of obtaining the rights to televise a thirteen-program series entitled "World." Brief of PBS, at 3. The series

was obtained and distributed by PBS and aired regularly by KUHT-TV. One of the programs in the series, produced jointly by WGBH Educational Foundation, licensee ofn noncommercial educational television statio WGBH-TV in Boston, Massachusetts, and ATV Network of London, England, was entitled "Death of a Princess." Id at 2. A documentary re-creation of the events surrounding the execution of a Saudi Arabian princess and her lover by the Saudi Arabian government, "Death of a Princess" was scheduled for distribution by PBS on Monday, May 12, 1980, at 8:00 p.m. KUHT-TV announced in its monthly program schedule, "The Public Times," (Plaintiffs' Exhibit 4) that it would televise the program at that time. During the second week in April, 1980, however, PBS alerted KUHT-TV and its other member stations, pursuant to its previously established policy, to the fact that "Death of a Princess contained what it referred to

as "controversial material."

The President of the University of Houston, Dr. Charles E. Bishop, and the Board of Regents of the University had delegated full responsibility for the operation of KUHT-TV, as well as KUHT radio, to Dr. Patrick J. Nicholson, the Vice President for Public Information and University Relations and a defendant in this case.[1] Dr. Nicholson, in turn, had delegated full responsibility for programming at KUHT-TV to Mr. James Bauer, KUHT-TV's General Manager, and Ms. Virginia Mampre, KUHT-TV's Director of Programming. See Plaintiffs' Exhibits 8, 9.

In his seventeen (17) years of supervising the operation of KUHT-TV, Dr. Nicholson had never, he testified, decided what was or was not to be shown by the station.

[1]Since the initiation of this suit, Dr. Nicholson has decided to resign from hisposition as vice president after Feb. 1, 1981. He testified that his decision was not prompted by this case or the events which precipitated its filing.

Notwithstanding that fact, when KUHT-TV was notified by PBS that "Death of a Princess" contained "controversial material," Dr. Nicholson stepped in. He reviewed the program, at Mr. Bauer's suggestion, twice before May 1, 1980, and briefly discussed the show with both Mr. Bauer and Ms. Mampre. On May 1, 1980, Dr. Nicholson--acting on his own authority and notifying neither Mr. Bauer nor Ms. Mampre of his decision--issued a press release stating that KUHT-TV would not carry "Death of a Princess." The press release, in its entirety, read as follows:

> FOR IMMEDIATE RELEASE, NOON, CDST,
> (May 1, 1980)
>
> KUHT, the nation's pioneer public television station licensed to the University of Houston, will not carry "Death of a Princess," it was announced today. The Public Broadcasting Service (PBS) documentary recreation, scheduled for broadcast May 12, has become the center of a rising storm of controversy since it was shown in England as a joint production of ATF, England and WGBH, Boston. Saudi Arabia ordered the British

ambassador to return to London after the telecast.

Patrick J. Nicholson, University of Houston System vice president who has administered KUHT since 1965, issued a prepared statement regarding cancellation of the program. The statement emphasized that the decision not to broadcast it was one of the extremely rare instances in which KUHT, first of the now 287 public television stations to go on the air, had cancelled PBS programming, but an action clearly indicated on balance.

Dr. Nicholson cited as a central issue "strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the Middle East, our long friendship with the Saudi government and U.S. national interests all point to the need to avoid exacerbating the situation."

He said that in KUHT's view, "The Death of a Princess" specifically charges widespread moral laxity at high levels of Saudi Arabian society, and questions the organization and policies of the Saudi government, through recreated interviews and narrative. These allegations are not balanced in a responsible manner, Dr. Nicholson added.

Neither Ms. Mampre nor Mr. Bauer

agreed with Dr. Nicholson's decision to cancel the program. Ms. Mampre, informed of Dr. Nicholson's decision after his statement had been released, told both Dr. Nicholson and Mr. Bauer that she disagreed with the decision. In a memorandum to Mr. Bauer, dated May 5, 1980 (Plaintiffs' Exhibit 6), Ms. Mampre wrote that she had scheduled the two hour special to air since the program was an example of the type of informational and public affairs prgramming called for by KUHT's charter. She noted that based on information received from PBS and WGBH all of the events portrayed in the film had at least two sources. Dr. Nicholson's decision not to air was made too early, Ms. Mampre concluded, in light of the fact that there were still two weeks left to analyze the international scene before making a final decision.

Mr. Bauer orginally shared Dr. Nicholson's concerns that "Death of a Princess"

lacked balance and perspective. His view of matters altered, however, when he learned that the program would be "balanced" by the broadcast of a follow-up show featuring a panel discussion of "Death of a Princess" which included participation by local viewers. By May 12, 1980, Mr. Bauer testified, he was convinced that "Death of a Princess" should be shown. Neither Ms. Mampre nor Mr. Bauer, however, had the authority to overrule Dr. Nicholson.

In response to an inquiry by Dr. Bishop at the meeting of the Broadcasting, Development & Public Affairs Committee of the Board of Regents on May 5, 1980, Dr. Nicholson explained the decision to cancel "Death of a Princess." See Plaintiffs' Exhibits 2, 5. Dr. Nicholson implied to the Committee that both Ms. Mampre and Mr. Bauer shared his view of the program. See Plaintiffs' Exhibit 5. In addition, in a conversation with Dr. J. Dans Armistead, Chairman of the

Committee and a member of the Board of Regents, Dr. Nicholson emphasized that the final decision fell on him rather than the Board. In this respect, said Dr. Nicholson, he was acting as a "heat shield" for the President and the Board. Id.

Dr. Bishop, President of the University, testified that he felt that it would have been improper to overrule Dr. Nicholson's decision. Dr. Nicholson, Dr. Bishop noted, had been delegated the responsibility to run KUHT-TV. He was not aware that Dr. Nicholson had delegated the responsbility for programming decisions to Ms. Mampre and Mr. Bauer. See Plaintiffs' Exhibits 8, 9. Nor was he aware that Dr. Nicholson had never before made a programming decision at KUHT-TV.

In addition to the reasons cited in his May 1, 1980 press release, the Court, upon consideration of Dr. Nicholson's testimony, finds that there are four other

reasons why he may have decided to cancel the program. First, Dr. Nicholson said that he considered the program to be "in bad taste." The scenes in which the royal princesses arranged "assignations" with attractive young men were, Dr. Nicholson felt, particularly offensive. Second, Dr. Nicholson explained that he was concerned that some members of the public might believe that this "docu-drama" was a true documentary. Third, Dr. Nicholson testified that the University of Houston had previously entered into a lucrative contract with the Saudi Arabian royal family to instruct a particular princess as part of its "Open University" program. Under that contract, the University of Houston had sent a professor to Saudi Arabia to serve as the princess' tutor and to hand-tailor a curriculum to suit her needs. Dr. Nicholson stated that he believed the princess educated pursuant to the contract and the princess

whose death was the subject of "Death of a Princess" were "distant cousins."

Finally, Dr. Nicholson testified that he had been in charge of all fundraising activities for the University of Houston from 1957 through 1978. Although a 1978 re-organization removed Dr. Nicholson from involvement with day-to-day fundraising, he was still responsible for soliciting large individual donations. The University of Houston, he testified, receives a significant percentage of its contributions from individuals in oil-related companies. According to Dr. Nicholson, 15 to 20 percent of the University of Houston's private contributions come directly from major oil companies. That percentage, it should be noted, does not include contributions from individuals who own shares in, have contracts with, or are employed by companies doing business in oil.

Upon learning of Dr. Nicholson's de-

cision, on May 8, 1980, plaintiff Barnstone initiated this suit to require KUHT-TV to air "Death of a Princess." Ms. Barnstone is a subscriber to and regular viewer of KUHT-TV. Although "Death of a Princess" has not been publicly broadcast in Houston, after this Court's order granting her motion for a temporary restraining order was vacated Ms. Barnstone did manage to attend two private screenings of the program. She has not seen, however, the follow-up program broadcast on the public television stations that carried the program. She maintains quite insistently, furthermore, that she still wishes to see "Death of a Princess," along with the follow-up program, broadcast on KUHT-TV. Plaintiff Harvey Malyn is also a viewer of KUHT-TV who desires to see "Death of a Princess" aired on that station. Mr. Malyn, unlike Ms. Barnstone, has never seen "Death of a Princess," with or without its follow-up program. Both

plaintiffs have asked this Court to issue a mandatory injunction requiring the showing of "Death of a Princess" on KUHT-TV.

THE ARGUMENTS OF THE PARTIES SUMMARIZED

The plaintiffs fully recognize that the programming decisions of private commercial television stations are not subject to constitutional attack. See Kuczo v. Western Connecticut Broadcasting Company, 566 F.2d 384 (2d Cir. 1977); CBS v. DNC, supra. They also acknowledge that the independent decision-making authority of privately owned and operated noncommercial television stations most likely immunizes their programming decisions from constituional review. See Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission, 593 F.2d 1102, 1109 (D.C. Cir.1978). But KUHT-TV, the plaintiffs note, is both owned and operated by instrumentalities of the State of Texas. It is,

as has been stipulated, a "governmental entity," see CBS v DNC, supra, for the purposes of First Amendment analysis. It is therefore, the plaintiffs contend, a "public forum," see CBS v DNC, supra, 412 U.S. at 140, 93 S.Ct. at 2105 (Stewart, J. concurring), which cannot refuse to broadcast a program "because of its message, its ideas, its subject matter, or its content," Police Department of Chicago v. Mosley, 408 U.S.92 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). Thus, the plaintiffs view KUHT's decision not to show "Death of a Princess" as an unlawful "prior restraint" in violation of the Constitution of the United States. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.ED.2d 448 (1976).

The defendants and amicus curiae PBS deny that KUHT-TV is a public forum. They argue that television stations owned and operated by the government may make the

same programming decisions as television stations owned and operated by private individuals. Both, they say, are acting as editors and editorial freedom, it is well-established, in both newspapers, Miami Herald Publishing Company v Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), and television, CBS v DNC, supra, 412 U.S. at 124-125, 93 S.Ct. at 2097-2098, is protected by the First Amendment. The defendants and amicus curiae also raise three procedural objections which, they say, prevent the Court from reaching the merits of this controversy. They are (1) that the case is moot because plaintiff Barnstone has already seen "Death of a Princess," (2) that this Court lacks subject matter jurisdiction because primary jurisdiction over this action rests with the Federal Communications, and (3) that the plaintiffs lack standing to sue. These procedural arguments will be addressed first.

MOOTNESS

[1] The defendants contend that this action is moot because plaintiff Gertrude Barnstone has viewed "Death of a Princess" on at least two prior occasions. In support of this contention, they have submitted the affidavits of two individuals who swear that they have knowledge that Ms. Barnstone has already seen the program which she seeks to force KUHT-TV to air. This is not denied by Ms. Barnstone. There are three reasons, however, why the defendants' mootness claim must fail. First, Ms. Barnstone testified that she has never seen "Death of a Princess" in its entirety--with the follow-up panel discussion--as it was telecast on public television stations. Second, it is not simply the inability to view "Death of a Princess" of which Ms. Barnstone complains; it is the act of the government in keeping it from her. As the plaintiffs state in their reply to the defendants'

motion for summary judgment, at 2 (hereinafter Plaintiffs' Reply Brief):

> If Lamont in Lamont v Postmaster General, 381 U.S. 301 [85 S.Ct. 1493, 14 L.Ed.2d 398] (1965) had already read a copy of the Peking Review which he ordered through the mail or if Stanley in Stanley v. Georgia, 394 U.S. 557 [89 S.Ct. 1243, 22 L.Ed.2d 542] (1969) had already privately viewed his obscene films many times before, the results in those cases would be no different. The present right to receive information free from this governmental obstruction, regardless of the motive for desiring such receipt, cannot be unconstitutionally abridged. [It is] the abridgement [itself which] presents [an actual] case or controversy.[2]

Third, even if plaintiff Barnstone's claim is in some manner moot, that would not deprive this Court of the power to hear this

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2. See also Virginia State Board of Pharmarcy v Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15, 96 S.Ct. 1817, 1823 n.15, 48 L.Ed.2d 346 (1976), in which the majority of the Supreme Court takes issue with the position of the dissent that the right to receive information should be limited to those situations inwhich the information sought to be received "wouldnot be otherwise reasonably available." Such asituation, concluded the majority, would simply make the plaintiff's"First Amendment claim a stronger rather than weaker one," but would have no effect on the validity of the claim itself.

action. Plaintiff Malyn has never seen "Death of a Princess" in any form on any medium. He claims that he wishes to see it on KUHT-TV. No prior viewing by Ms. Barnstone, of course, can prevent Mr. Malyn from obtaining a hearing before this Court.

Thus, even accepting all of the defendants' arguments, the most that could be said is that plaintiff Barnstone has no standing to maintain this action. As indicated above, plaintiff Malyn suffers from none of those alleged standing infirmities.

PRIMARY JURISDICTION

The defendants and amicus curiae next argue that primary jurisdiction in the present case lies not with this Court, but with the Federal Communications Commission (FCC). With the passage of the Communications Act of 1934, the defendants and amicus curiae say, it was the intention of Congress to occupy the television field in its entirety.

See Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F.2d 153, 155 (3rd Cir. 1950), cert. denied, 340 U.S. 929, 71 S. Ct 490, 95 L.Ed. 670 (1951). Thus, the courts may not, they maintain, consider the kinds of questions within the ambit of the FCC's jurisdiction except on appeal of FCC decisions. See Writers Guild of America, West, Inc. v. American Broadcasting Company, 609 F.2d 355 (9th Cir. 1979). The defendants and amicus curiae further argue that this case directly affects the basic regulatory scheme of the Communications Act, for it involves the question of the authority of licensees to make certain types of programming decisions. This is a matter, they assert, which should be resolved in a consistent manner nationwide. It must therefore, they insist, be considered first by the FCC.

[2] A proper understanding of primary jurisdiction clearly shows that the doctrine

is not applicable to the present case. As the United States Supreme Court said in Nader v Allegheny Air Lines, Inc. 426 U.S. 290, 303, 96 S.Ct. 1978, 1986, 48 L.Ed.2d 643 (1976), citing United States v. Western Pacific Railway Company, 352 U.S. 59, 63, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956), the doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." In Western Pacific, supra, at 63-64, 77 S.Ct. at 165, the court had said:

> "Primary jurisdiction" ...applies where a claim is originally cognizable in courts, and comes into play when the enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Such deference by the courts to the role of the administrative agency is particularly applicable, the Supreme Court noted, where

the disputed issue "involves technical questions of fact uniquely within the expertise and experience of an agency." Nader, supra, 426 U.S., at 304, 96 S.Ct., at 1987.

In the instant case, as with the mootness claim, there are three reasons why the doctrine of primary jurisdiction is not applicable. First, the plaintiffs' claim in the present case raises no issue which is peculiarly within the special expertise of the FCC. This Court would, of course, be obligated to defer to the FCC if this case involved issues "not within the conventional experiences of judges" or requiring "the exercise of administrative discretion." Far East Conference v. United States, 342 U.S. 570, 574, 72 S.Ct. 492, 494, 96 L.Ed. 576 (1952). No such issues, however, are present here. The plaintiffs in this case, unlike the plaintiffs in Writers Guild, supra, do not challenge the validity of a

specific policy claimed to be adopted under the Communications Act by the FCC. Nor do they assert that the decision not to air "Death of a Princess" violated a particular provision of the Communications Act. Their claim is not based on the Communications Act; it is, rather, based squarely on the First and Fourteeth Amendments. It is the federal courts, not the FCC, which have particular expertis in the interpretation of the Constitution.

Second, although under other circumstances it may prove both advisable and useful for a Court to obtain the opinion of the FCC on the issues presented to it, this, is not such a case. The issues presented in the instant case are issues of first impression to this Court, but they have already been raised twice before the FCC. See City of New York Municipal Broadcasting System, 56 F.C.C.2d 169 (1975); Mississippi Authority for Educational Television, 71 F. C.C.2d 1296 (1979). In City of New York,

supra, the FCC specifically held that, since the Communications Act of 1934 made no distinction between government owned and operated stations and privately owned and oprated stations, the former were under no greater programming limitations than the latter. "[T]he public forum doctrine," the FCC wrote, "is inapplicable to broadcast licensees." Id. at 170. When the issue was raised again in Mississippi Authority, supra, the FCC considered it sufficiently without support to be disposed of in a footnote. Id. at 1312 n.23. It would therefore serve no useful purpose to refer this case to the FCC. The agency's position on this issue has already been stated with sufficient clarity.

Third, there is an even more compelling reason in this particular case why this Court should not defer to the FCC. The remedy that the plaintiffs in the instant case seek--a mandatory injunction re-

quiring the airing of "Death of a Princess" --is not the type of remedy which the FCC is able to provide. The FCC is empowered to review a licensee's programming to determine whether it continues to serve the public interest of the community in which it is located. Where a long-standing pattern of abuse has been shown, the FCC can and does deny the licensee's application for renewal of its license. See Star Stations of Indiana, Inc., 551 F.C.C.2d 95 (1975); Alabama Educational Television, 50 F.C.C. 2d 461 (1975). Except where a violation of the fairness doctrine is concerned, however, the FCC does not have the power, or at least has not chosen to exercise the power to order any particular licensee to broadcast any specific program. See Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 89 S. Ct. 1794, 23 L.Ed.2d 371 (1969). Right to Life of Louisville, Inc. V. Station WAVE-TV

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F.C.C.2d 1103 (1976); and In re Mark Lane, 37 F.C.C.2d 630 (1972). As the FCC is powerless to grant the only remedy which the plaintiffs correctly argue will provide effective relief, a deferral of jurisdiction would be pointless in this case. Consequently, the doctrine of primary jurisdiction does not deprive the Court of jurisdiction over this cause of action. See Kelley v. WMUL-TV, No. 80-3282 (S.D.W.Va. Oct 16, 1980).[3]

STANDING

The defendants' final procedural objection is that the plaintiffs do not have

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[3]. In Kelley, a closely analogous case involving a television station owned and operated by an agency of the State of West Virginia, the United States District Court for the Souther District of West Virginia stated: "Inasmuch as the court perceives neither special expertise in the FCC in handling constitutional claims against stat governments (areas in which the courts are experienced), nor an administrative remedy which would redress plaintiff's alleged injuries, the Court holds that the doctrine of primary jurisdiction does not apply and the case is properly before this court."

standing to maintain the present suit. The essence of the standing question, the Supreme Court has pronounced, "is whether the plaintiff has alleged such a personal stake in the outcome of the controversy [as] to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2205, 45 L.Ed2d 1343 (1975), quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962) (emphasis in original). See also Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 261, 97 S.Ct. 555, 561, to L.Ed.2d 450 (1977). To determine whether the requisite "personal stake" is present, the Supreme Court has established a two-part test. First, the Court must examined whether the plaintiffs allege "a distinct and palpable injury." Warth, supra, 422 U.S., at 501, 95 S.Ct. at

2206. "The plaintiff must show that he himself is injured." Arlington Heights, supra, and "cannot rest his claim to relief on the legal rights or interest of third parties." Warth, supra, at 499, 95 S.Ct., at 2205 Second, the Court must assure itself that the injury suffered is "fairly traceable to the defendant's acts or omissions," Arlington Heights, supra, 429 U.S., at 261, 97 S. Ct. at 561; see also, Duke Power Co v. Carolina Environmental Study, 438 U.S. 59, 98 S.Ct. 2620, 2630-31, 57 1.Ed.2d 595 (1978); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 96 S.Ct. 1917, 1925-1926,48 L.Ed.2d 450 (1976) and O'Shea v. Littleton, 414 U.S. 488, 498, 94 S.Ct. 669, 677, 38 L.Ed.2d 674 (1974), "or, put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries." Duke Power, supra, 98 S.Ct. at 2631.

[3] The plaintiffs have little difficulty in meeting both parts of this test. To begin with, the plaintiffs contend that the actions of the defendants deprived them of their right to view a program which they were constitutionally entitled to see. "It is now well-established," the Supreme Court stated in Stanley v. Georgia, 394 U.S. 557, 564, 89, S.Ct. 1243, 1247 22 L.Ed.2d 542 (1969), "that the Constitution protects the right to receive information and ideas," as well as to convey them. "[F]reedom of speech and press," the Court said, id, "necessarily protects the right to receive. See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-1823, 48 1.Ed.2d 346 (1976); Kleindienst v. Mandel, 408 U.S. 753, 762-763, 92 S.Ct. 2576, 2581-2582, 33 L.Ed.2d 683 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308, 85 S.Ct. 1493, 1496-1497, 14 1.Ed.

2d 398 (1965) (Brennan, J., concurring), Brooks v. Auburn university, 412 F.2d 1171, 1172 (5th Cir. 1969). The plaintiffs in the present case are clearly asserting their rights to receive, not the "rights or interests of third parties." Warth, supra. In addition, there is little doubt that the plaintiffs' injuries are a direct result of the defendants' refusal to air "Death of a Princess." If the Court grants the mandatory injuction requested by the plaintiffs, the alleged violation of their constitutional rights will indisputably be redressed in full.

The defendants argue that the right to hear "presupposes," in some sense, the existence of "a willing speaker." Virginia State Board of Pharmacy, supra. As no such speaker is present here, the defendants say, the plaintiffs lack standing to maintain this suit. The defendants, however, are confusing what must be shown to prove stand-

ing and what must be shown to prove a violation; their objection goes to the merits rather than the standing question. The plaintiffs contend that their first Amendment right to receive information has been violated. Those rights are personal, and are separate from and independent of any other party's right to speak.[4] In order to obtain standing, the plaintiffs need only show that the alleged deprivation of their rights was caused by the defendants.

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4. The independent nature of the First Amendment right to receive information was high-lighted by the Supreme Court in Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). There the Court found it unnecessary to assess the rights of inmates to send letters since the censorship by prison officials infringed equally upon the First Amendment rights of the addresses. Id. at 408-409, 94 S.Ct. at 1808-1809. Similarly, the Court in Virginia State Board of Pharmacy, supra, found that the consumers First Amendment right to receive drug price information was independent of the nonparty advertiser's right to distribute such information. Id., 425 U.S. at 756-757, 96 S.Ct. at 1822-1823. These and other cases, see cases cited in Virginia State Board of Pharmacy, supra at 757, 96 S.Ct. at 1823, make clear that the right to receive information is sufficient, at a minimum, to give a plaintiff standing and allow that person to show, at a hearing on the merits, that a willing speaker exists.

See Arlington Heights, supra. However, in order to prove their case that those rights were, in fact, violated they must show that someone, somewhere was trying to say what they wanted to hear. Otherwise, the "prior restraint" of which they complain would constitute no "restraint" at all. The defendants' objections will be addressed in due course, but they do not prevent the plaintiffs from obtaining standing.

THE HISTORICAL DEVELOPMENT OF PUBLIC TELEVISION

Before the merits of the parties' claims are addressed, it is important to review the regulatory structure of public television in order to place this cause of action in perspective. Although the issues in this case are novel, they stem quite naturally, it will be seen, from the historical development of public broadcasting.

When television was first introduced in this country, there was no such thing as

public television. All entities that wished to broadcast over a particular channel, whether commercial or noncommercial in nature, submitted their applications to the Federal Communications Commission. The FCC, which regulated television and radio broadcasting under the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., awarded the license to the applicant which it determined would best serve the "public interst, convence and necessity." 47 U.S.C. § 309(a).[5] Although the FCC did not focus on whether the applicant was a commercial or noncommercial entity, the results of this open competition was that only of the first

[5].Communication in the United States, in keeping with the First Amendment's protection of freedom of speech, had traditionally been unregulated. Television and radio, however, unlike the print media, utilize the electromagnetic spectrum, in which there is "a fixed natural limitation upon the number of stations [that can] operate without interfering with one another." National Broadcasting Company v. United States, 319 U.S. 190, 213, 63 S.Ct. 997, 1008, 87 L.Ed. 1344 (1943). For that reason, regulation of radio and television broadcasting was deemed approriate. See is. Red Lion Broadcasting Company, supra, 395 U.S., at 376-377, 89 S.Ct., at 1799-1800.

108 stations-WOI TV in Ames, Iowa--was licensed to a noncommercial applicant--Iowa State College--and only then because no one else was interested in operating a television station in central Iowa in the late 1940's. Blakely, supra, at 1, 5.

Shortly after licensing WOI-TV, the FCC, on September 29, 1948, instituted a freeze on the processing of applications for televsion licenses. Id. at 1. The freeze was spurred by reasons unrelated to the licensing of WOI-TV and the development of public broadcasting, id., but that did not prevent educators who wanted to operate television stations from making the most of it. These educators, who "had learned from experience with AM radio that they needed channels reserved specifically for noncommercial stations because they could not compete for licenses with commercial broadcasters in the open market, "id. at 1-2, put their case before the FCC. On April 24, 1952

before the freeze was lifted, the FCC responded. It issued its "Sixth Report and Order," temporarily reserving 242 television channels out of a total of 2053, slightly more than 11 percent, for noncommercial educational broadcasting. Chester, Garrison, and Willis, Television and Radio 211 (1978). Later that year, the FCC increased the number of channels reserved and in 1953, it made the reervations permanent. Blakely, supra, at 3. Educational television, the forerunner of today's public television, was, for the first time, a reality.

The reservation of specific channels for noncommerical educational television, however, did not sufficiently alleviate the problem of a chronic shortage of money which plagued the early noncommercial educational television stations. Throughout the 1950's and the early 1960's, "[o]nly repeated financial transfusions from the Ford Foundation prevented the system

from collapsing." Broadcast Industry 202 (R. Stanley, ed. 1975). In 1962, Congress passed the Educational Television Facilities Act, 47 U.S.C. §§ 390-397, since amended, "to assist (through matching grants in the construction of educational television broadcasting facilities," 47 U.S.C. § 390, but it soon became clear that, if noncommercial television was to survive, the federal government would have to play a larger role in financing it. The turning point, five years later, was the issuance of the landmark Carnegie Commission report.

In November, 1965, the Carnegie Corporation had formed a Commission on Educational Television to "conduct a broadly conceived study of noncommercial television" and to "recommend lines along which noncommercial television stations might most usefully develop during the years ahead." Blankely. supra, at 169. In January, 1967,

the Commission issued its report. Id. at 175. Entitled Public Television: A Program for Action (hereinafter Carnegie Report), the report as is stated in its introduction, "separated educational tele-) vision programming into two parts: (1) instructional television, directed at students in the classroom or otherwise in the general context of formal education, and (2) what we shall call Public Television, which is directed at the general community...[and which] includes all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction." For the former, it recommended further study. Carnegie Report, at 9. For the latter, which it explained, "is not the educational television that we now know," id. at 4, it recommended massive federal funding. Id. at 5-9.

The report, it should be noted, did not advocate direct federal funding of public television by Congress. It recognized that "[t]here is at once involved the relation between freedom of expression, intimately and necessarily a concern of Public Television, and federal support." Id. at 37. It recommended, therefore, that Congress establish a "federally chartered, nonprofit, nongovernmental corporation, to be known as the 'Corporation for Public Television.'" id. at 5, through which federal funds were to be channelled. It made clear, furthermore, that the "Corporation [was to] exist to serve the local station but [not to] operate it nor control it." Id. "The local stations must be the bedrock upon which Public Television is erected," the report stated, at 36, "and the instruments to which all its activities are referred." While the Corporation was to fund public television programs, "each

station [was to] decide whether and when to use them. Id. at 5.

Congress responded almost immediately with the Public Broadcating Act of 1967. 47 U.S.C. § 390-399, since amended. The Act, which adopted many of the Carnegie Commission's suggestions, authorized a study of instructional television while appropriating federal monies for the funding of public television. See S.Rep.No.222, 90th Con., 1st Sess., reprinted in [1967] U.S. Code Cong. & Ad.News 1772, 1793-1794. Public television stations, according to the Senate report to the Act, were "to provide educational, cultural, and discussion programs, which [would] serve the general community." Id. at 1782. "The program[m]-ing of these station," the Senate Report said, id. at 1777, "should not only be supplementary to but competitive with commercial broadcasting services."

Congress was, of course, aware that federal funding brought with it the danger of governmental content control. As the Carnegie Commission had suggested, "to minimize the likelihood that [governmental] scrutiny [would] be directed towards the day-to-day operations of the sensitive gram portions of the Public Television system," Carnegie Report, at 37, it must be emphasized at this point is the

> authorized creation of the Corporation for Public Broadcasting, "a nonprofit corporation...which [would] not be an agency or establishment of the United States Government," [47 U.S.C. § 396 (b)] as a funding mechanism for virtually all activities comprising non-commercial broadcasting.

Network Project v. Corporation for Public Broadcasting, 561 F.2d 963, 973(D.C.Cir. (1977), cert. denied, 434 U.S. 1068, 98 S.Ct. 1247, 55 L.Ed.2d 770 (1978). Congress took steps to insulate the Corporation from political control. See, 47 U.S.C. §§ 396(c (1) and (1)(1)(A); 47 U.S.C. § 398(a); Ac-) curacy in Media, Supra, at 295. It also

took steps, however, as the Carnegie Commission had recommended, to isulate the local stations from the Corporation's control. "It should be remembered," the Senate Report echoed, at 7, "that local stations are the bedrock of this system." Thus, although it was the Corporation's duty to "assist in the establishment and development of one or more interconnection systems" to enable public television to become national in scope, the Corporation was not permitted to own or operate the "interconnection system" itself. 47 purpose, the Corporation had to establish another independent organization to act as as "interconnection system."

That organization was the Public Broadcasting Service (PBS). Established by the Corporation in November, 1969, "PBS was not to produce programs but was to [the corporation] and the Ford Foundation develop

among the major production centers suitable programs which PBS would distribute by interconnection." Blakely, supra, at 200. It began operations in Octobe, 1970, selecting the shows to be offered nationwide, scheduling them, promoting them, and distributing them. Id at 203. PBS provided a service to the local stations, but was structured so as not to infringe upon their freedom to show what they wanted. The local stations were still free to decide when and whether to show the programs distributed by PBS. Id. at 200.

Within a few years, however, it became clear that even this level of involvement by PBS in determining what was to be shown was unacceptable. The local stations, it was true, had the right to accept or reject what PBS offered, but if they were to be part of a national public television system they had to show what PBS offered. PBS, in other words, was determining the content of

the programs shown on national public television. To remedy this situation, in 1974, the Station Program Cooperative (SPC) was formed. The operation of the SPC has been discussed earlier in this opinion. What must be emphasized at this point is the purpose for which the SPC was formed: the prevention of governmental content control of programs broadcast on public television stations. Through this mechalnism, PBS, the recipient of federal funds, was effectively relieved of its control over programming content. The local television stations could, as they had never done before, actually determine the programming content of national public television. There was only one problem with this solution: the "bedrock" was constructed of quicksand. Although no one seemed to notice, the local stations were, in many instances, owned and operated by state and local governments.

There were two explanations for this fact. First, the development of television was greatly influenced by the development of radio which preceded it. It was therefore only natural that colleges and universities such as Iowa State College, which had been involved in the develpement of radio since its very beginning, see Blakely, supra, at 5, 35, would play a similar role in the development of television. If the colleges and universities happened to be affiliated with the State, that, at the time, seemed of no great moment. Second, prior to 1967, when the Carnegie Report was issued and the Public Broadcasting Act was passed, public television, it must be remembered, was "educational" televsion. As "public education in our Nation is committed to the control of state and local authorities," Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968), it was only proper that educational

television stations were licensed to those authorities. Of the 124 educational stations on the air in late 1966, 84 were owned and operated by state and local government entities. Carnegie Report, at 21, 22.

When "educational" television became "public" television in 1967, the justification for state and local government owned and operated stations, however, continued to exert a profound influence on public television in this country. Although private parties can and do own and operate public television stations, "of the approimely 285 public television stations in this country [today] 132 are licensed to state or municipal instrumentalities and 77 are licensed to colleges or universities, most of whome [sic] are affiliated with government." Brief of PBS, at 5. These stations, moreover, as has been discussed, have been given increasing responsibility

for programming. The possibility of government content control from above has appeared so ominous that the possibility of government content control from below has been entirely overlooked. This case is a direct result of that oversight. In effect, with state and local government firmly entrenched as gatekeepers to the public's access to information, the fox has been asked to guard the henhouse.

GOVERNMENT TELEVION STATIONS AS PUBLIC FORUMS

[4] The plaintiffs contend that KUHT-TV, which the parties have stipulated is a "governmental entity" for the purposes of First Amendment analysis, is a "public forum." See Southeastern Promotions, Ltd. v. Conrad, supra,420 U.S., at 552, 95 S.Ct., at 1243 (1975); CBS v. DNC, supra 412U.S., at 140,93 S.Ct., at 2105 (Stewart,J., concurring); id. at 193-196, 93 S.Ct.,at 2132-2134 (Brennan,J., concurring). This, they say, "is the

decisive point of the entire constitutional issue." Plaintiff's Reply Brief, at 10. If KUHT-TV is a public forum, then the defendant's decision not to air "Death of a Princess" on the station constituted, the plaintiffs maintain, a constitutionally prohibited "prior restraint." See Conrad, supra, 420 U.S., at 556, 95 S.Ct., at 1245. The defendants and amicus curiae deny that KUHT-TV is a public forum. They say that KUHT-TV is a licensee under the Communications Act of 1934, and, as such, is both free and obligated to make programming decisions, ns,including content based decision, on the basis of its own judgment. They maintain that the First and Fourteenth Amendments place no limits whatsoever on a government owned and operated television station's exercise of editorial discretion.

The public forum doctrine grew out of those cases in which state and local

governments attempted to limit expressive activities on certain property owned by the government. Facing the issue initially in Davis v. Massachusetts, 167 U.S.43,17 S.Ct. 731, 42 L.Ed. 71 (1897), the Supreme Court held that the government was free to do what it wanted with its property. "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park," the Court said, "is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." Id. at 47, 17 S.Ct. 733. Although that view lasted for quite some time, Justice Roberts, writting Hague vs. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed.1423 (1936), explicitedly rejected it. The government, Justice Roberts said, was not as free as free to do what it wished with its property.

We have no occasion to determine whether, on the facts disclosed, the Davis

Case was rightly decided, but we cannot agree that its rules the instant case. Wherever the titles of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time of mind, have been used for purposes of assembly, communicating thoughts between citzens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regarded in the interest of all; ... but it must not, in the guise of regulation, be abridged or denied. 307 U.S. 515-516, 59 S.Ct. 964. Justice Roberts' concurring opinion in Hague v. CIO, supra, was not joint by majority of the Court, but the principles he expressed therein soon were. In a long

series of opinions, the first of which, Schneider v. State of New Jersey, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), was authored by Justice Roberts with only one Justice dissenting, the Court invalidated government attempts to regulate expressive activities in public parks, city streets or public ways when the regulations involved were related to the content of expressive activities taking place. See Schneider, supra; Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87, L.Ed. 869 (1943); Kunz v. New York 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2L.Ed.2d 302 (1958); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. p286, 33 L.Ed.2d 212 (1972); Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222(1972). Such places

the Court held, were "public forums"[6] and "[s]elective exclusions from a public forum'" and "[s]elective exclusions from a public forums," the Court said, "may not be based on content alone, and may not be justified by reference to content alone." Mosley, supra, U.S. at 96, 92 S.Ct., at 2290.

Since its birth in Justice Roberts' concurrence in Hague v. CIO, supra, the publc forum doctrine has grown to encompass many areas which have not, "time out of mind," been used "purposes of assembly, and discussing public question." It has been applied to

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[6]While the phrase "public forum had been used by the Supreme Court in rare instances prior to 1965, see International Association of Machinist v. Street, 367 U.S. 740, 796, 81 S.Ct. 1784, 1815, 6 L.Ed.2d 1141 (Black, J., dissenting) and 806 (Frankfurter, J. dissenting) (1961), the appel- lation only gained recognition after Harry Kalven articuled the public forum concept in Kalven, "The Concept of the Public Forum and Cox v. Louisiana, 1965 Sup.Ct. Rev. 1. The Supreme Court first used the phrase in a majority opinion in Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33L.Ed.2d 212 (1972), in which Kalvenk's article is cited frequently.

bus terminals, Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.1968) cert, denied, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed 2d 275 (1968); airports, Chicago Area Mili- Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975), cert. denied, 421. U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975); high school auditoriums, National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir.1973); public libraries, Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); shopping centers, Amalgamated Food Employees v. Logan Vally Plaza, 391 U.S. 308, 88 S.Ct 1601, 20 L.Ed.2d 603 (1968); welfare offices, Albany Walfare Rights Organization v. Wyman, 493 F.2d 1319 (2d Cir. 1974); and the visitor recognition period of public school board meetings. Princeton Education Association v. Princeton Board of Education, 480 F. Sup 962 (S.D. Ohio, 1979).

A recent public forum case heavily relied upon by the plainiffs is Conrad, supra.

In Conrad, the Supreme Court addressed the question of whether the members of a municipal board in Chattanooga, Tennessee, could refuse to allow the rock musical "Hair," to be performed in a city auditorium and a city-leased theatre. The board had determined that performance of the musical was not "in the best interest of the community." Id. 420 U.S.., at 548-549, 95 S.Ct., at 1241. the Supreme Court held that the board's decision was an unconstitutional prior restraint. The audtorium and the theatre, the the Court stated, "were public forums designed for and dedicated to expressive activities. There was no question as to the usefulness of either facility for petitioner's production." Id. at 555, 95 S.Ct., at 1245.

Faced with a similar set of facts in Southeastern promontions, Ltd. City of West Palm Beach, 457 F.2d 1016 (1972), United

States Court of Appeals for the Fifth Cicuit it had reached a similar conclusion. "The crucial query," according to the Fifth Circuit, "is whether or not the particular public facility involved in this litigation constitutes an appropriate place for exercise of First Amendment rights." Id. at 1019. The factors the Court considered in making that determination were the character and pattern of activity of the place, as well as its essential purpose and the population who make use of the faclity. After applying these factors to the municipal auditorium involved, the Fifth Circuit found "it quite evident that thois particlar public facility is a highly approporiate site for First Amendment activities." Id.

Implicit in the cases cited above is that a public forum is a place that is (1) controlled by the government and (2) appropriate as a place for the communica-

on of views on issues of political and so-social significance. See specifically specifically Wolin v. Port of New York Authority, supra; Albany Welfare Rights Organization, supra; City of West Palm Beach, supra. There is no question that KUHT-TV is precisely such a place. First, it has been sitpulated, as has been noted that both KUHT-TV and the University of Houston are "governmental entities" for the purpose of First Amendment analysis. Secon, as Justice Brennan stated in CBS v. DMC, supra, 412 U.S., at 194-195, 93 S.Ct., at 2132-2133 (dissenting opinion) (emphasis iginal, footnote omitted):

> There can be no doubt that the broadcast frequencies alloted to the variou radio and television licensees constitute appropriate "forums" for the discussion of controversial issues ofs public importance. Indeed, unlike the

> streets, parks, public libraries, and other "forums" that we have held to be appropriate for the exercise of the First Amendment rights, the broadcast media are dedicated specifically to communication. And, since the expression of idea--whether political, commercial, musical, or otherwise--is the exclusive purpose of the broadcast spectrum, it seems clear that the adoption of a limited scheme of editoral advertising would in no sense divert that spectrum from its intended use.

his is all the more true for public tele-ision stations with their special emphasis n public affairs programming. (See discus-ion above.) In addition, if the historical sage of KUHT-TV is deemed relevant, a simple eview of KUHT-TV's program guide, plaintiffs' xhibit 4, reveals that KUHT-TV regularly com-unicates views on issues of political and ocial significance.

The defendants offer six reasons as to why KUHT-TV should not be held to be a public forum. First, the defendants say, the University of Houston as a broadcast licensee, already has "am affirmative and independent statutory obligation to provide full and fair coverage of public issues." CBS v. DNC, supra, 93 S.Ct. at 2100, and for that reason this Court should impose no further obligations to provide the plaintiffs with access to their station. It is true, of course, that under the Communications Act of 9134 licensees have certain obligations and that those obligations may have some influence on the issues in this case. They do not, however, resolve those issues. The question here is what constitutional, rather than statutory, obligations are imposed on the University of Houston and KUHT-TV.

Second, the defendants contend that to declare KUHT-TV a public forum would be

to render it a "common carrier" and that § 3(h) of the Communications Act specifically provides that "a person engaged in ...broadting shall not ... be deemed a common carrier." 47 U.S.C § 153(h). See Federal Communications Commission v. Midwest Video Corporation, 440 U.S. 689, 99 S.Ct., 1435, 59 L.Ed.2d 692 (1979). However, 47 U.S.C. § 153(h), is a statutory definition. It was not intended to be, nor is it, a statement by the Congress as to how the constitution is to be interpreted. Furthermore, a "common carrier," as defined in the Communications Act has specific rules and regulations governing its conduct. See 47 U.S.C. § 201 et seq. While a television station which is found to be a public forum may well be the functional equivalent of a common carrier, see CBS V. DNC, supra, 412 U.S., at 140, 93 S.Ct., at 2105 (Stewart, J., concurring), it is not at all clear that the stan-

dards of conduct of the the latter apply to the former. Thus, a finding that KUHT-TV is a public forum does necessarily require that it be "deemed" a common carrier. Finally, if a finding that KUHT-TV is a public forum would come into conflict with 47 U.S.C. § 153(h), it is that section which would have to yield. It is the Constitution of the United States, not the Communications Act of 1934, which is the supreme law of the land.

The defendants' third argment is somewhat related to its second. KUHT-TV, defendants assert, particularly because it is a public television station, is required by the Communications Act to exercise its own editorial discretion. To hold that it is a public forum, the defendants maintain, would deprive it of most, if not all, of the discretion. This argument like the preceding one, is subject to the criticism that it places the Communications Act above

the Constitution. Moreover, as has been noted earlier, the entire reason for the placemenmt of control over programming in the hands of local public television stations was the fear that the goernment would control the programming content. To say that the passage of the Public Broadcasting Act of 1967 and the establishment of CPB, PBS, and the Station Programming Cooperative were intended to require the government to exercise content control over the public television programming is to ignore both the historical development of and the fundamental purposes behind those events.

The defendants' fourth argument is, in effect, that KUHT-TV should not be declared a public forum because it has not been operated as one in the past. The argument is encapsulated in the defendants' letter to the Court of August 25, 1980. In that

letter, at 1, the defendatns argue as folows:

> State ownership and control do not make an instrumentality a public forum. Obviously, a judge's chambers and private government offices are not public forums. The key is the public's right of access and, clearly there is no public right of access to programming on KUHT-TV.

This argument, however, ignores the case law on the public forum doctrine. Contrary to the defendants' contention, the key is not the public's right of access. As the Fifth Circuit said in City of West Palm Beach, supra, at 1019, "[t]he crucial inquiry is whether or not the particular public facility involved in this litigation constitutes an appropriate kplace for the exercise of First Amendment rights." A determination of whether judge's chambers and private government offices are public

forums turns on whether or not they are "appropriate place[s] for the exercxise of First Amendment rights," not whether or not the public has a right of access to these places.

The defendants' fifth argument is that to dedclare KUHT-TV a public forum would be to ignore the "unusual order of First Amendment values," CBS v. DNC, supra, 412 U.S., at 106, 93 S.Ct., at 2088, presented by television broadcasting. The Court is, of course, aware that the "differences in the characteristics of [broadcasting] justify diferences in the First Amendment standards applied to [it]." Red Lion Broadcasting Company, supra, 395 U.S., at 386, 89 S.Ct. at 1805. It is the special characteristics of broadcasting--the natural limitation on the number of stations that can effectively communicate at any one time--that justifies the placement of limi-

tations on the traditionally free exercise of First Amendment activities by broadcast licensees. That characteristic in no way, however, justifies the total elimination of the First Amendment prohibition against government content control of free speech in America.

The defendants' argument seems to boil down to the contention that television is so powerful a medium that it cannot be declared a public forum. As the Supreme Court said in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073 (1978), the broadcast media have established "a uniquely pervasive presence in the lives of all Americans." That, however, is an argument for declaring KUHT-TV a public forum, not an argument against it. The more powerful and pervasive a communications medium, the more dangerous the spectre of government content

control. As the Supreme Court said in Conrad, supra, 420 U.S. at 557-558, 95 S.Ct. at 1246.

> each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems ... [T]he basic principles of freedom of speech and the press, [however,] like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The defendants' sixth and final arguemtn against declaring KUHT-TV a public forum, dciting CBS v. DNC, the Supreme Court was faced with the question of whether a private broadcast licensee's refusal to accept editorial advertisements urging con-

troversial positions violated the First Amendment. A clear understanding of the holding is made somewhat difficult by the presnece of six different opinions, none of which express a majority view in its entirety. A clear majority did, however, conclude that the private broadcaster in that case, CBS, did not violate the First Amendment in refusing the advertising offered by DNC. Chief Justice Burger, writing for himself, Justice Stewart, and Justice Rehnquist, held that CBS's actions did not constitute "governmental action" for the purposes of the First Amendment. Writing for the Court, Chief Justice Burger then addressed "the question whether the 'public interest' standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assumming governmental action, broadcasters are required to do so by reason of the First

Amendment." Id. 412 U.S. at 121, 93 S.Ct. at 1096. He concluded, Id. at 124-135, 93 S.Ct., at 1097-108, that CBS was not required to accept DNC's advertising.

The defendants rely quite heavily on the latter portion of the Court's opinion. Under the Communications Act, they say, KUHT -TV and the University of Houston are editors, and"[f]or better or worse, editing is what editors are for," quoting CBS v. DNC, supra at 124, 93 S.Ct., at 1097. However, the defendants fail to fully appreciate the context in which this statement took place. It is true that Chief Justice Burger assumed that governmental action was present for the purpose of his subsequent discussion of the application of the public interest standard. That assumption, however, was premised upon the fact that the editorial decison at issue was that of a private broadcasting company.

See Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1083 (5th Cir. 1976); Canby, "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 Tex. L.Rev. 1123 (1974). A review of CBS v. DNC leaves little doubt that had a government owned and operated televisoin station been involved, a different result would have been reached. To begin with, Chief Justice Bukrger, himself, in a portion of his opinion joined in by Justices Rehnquist and Stewart, wrote as follows:

> Were we to read the First Amendment to speel out governmental action in the circumstances presented here, few licensee decisions on the content of broadcaster or the processes of editorial evaluation would escape constitutional scrutiny... Journalistic discretion would in may ways be lost to the rigid limitations that the

First Amendment imposes on govcernment ...

> The concept of private, independent broadcast journalism, regulated by government to assure protection of the public interest, has evolved slowly and cautiously over more than forty years and has been nurtured by processes of adjudicatoin. That concept of journalistic independence could not co-exist with a licensee as governmental action.

The existence of KUHT-TV, it should be noted, does not comport with "the concept of private, independent, broadcast journalism."

Other members of the Supreme Court voiced concerns similar to those expressed by Chief Justice Burger. Justice Stewart, in his concurring opinion, objected strenuously t the suggestion that the action by CBS was "governmental action," recognizing how different the outcome would be were it found

to be so. "Were the government really operating the electronic press," stated Justice Stewart, "it would ... be prevented by the First Amendment from selectoin of broadcast content and the exercise of editorial judgment." CBS v. DNC, supra 412 U.S., at 143, 93 S.Ct., at 2106 (emphasis in the original). "To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights. They would be obligated to grant the demands of all citizens to be heard over the air, subject only to 'time,place and manner.'" Id. at 139, 93 S.Ct., at 2105.

Justice Douglas, in his own concurrence, was most emphatic on this point. "If a TV or radio licensee were a federal agency, the thesis [that a licensee's decisions are government actions governed by public forum analysis] would in-

exorably follow." Such "a licensee, like an angency of the Government, would within limits of its time be bound to disseminate all views. For being an arm of the Government, would within limits of its time be bound to disseminate all views. For being an arm of the Government, it would be unable to by reason of the First Amendment to 'abridge' some sectors of though in favor of others." Id. at 150, 93 S.Ct. =, at 2110.

Justice Brennan's dissent, joined in by Justice Marshall, argued that CBS itself should be considered public forum. Id. at 170-204, 93 S.Ct. at 2120-2138. The Court notes that if one accepts that CBS is a public forum, there can be little doubt as to the status of KUHT-TV.

This Court has discussed at length the various opinions in CBS v. DNC. Such close scrutiny is warranted, however, becasue the defendants contend that that case establish-

es that it is KUHT-TV, not the plaintiffs who are protected by the First Amendment in the present case. And this Court is convinced that CBS v. DNC, more than any other ase cited by any of hte parties, establishes the opposite proposition. See Kelley v. WMUL-TV, supra.[7] But see Muir v. Alabama Television Commissiond, No. 80-G-0607-S (N.D.dAla. July 3. 1980).[8]

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[7] The United States District Court for the Southern District of West Virginia reached the same conclusion in finding governmental action present where the licensee was defendant West Virgina Educational Broadcasting Authority (WVEBA), an agency of the government of the State of West Virginia. On this basis it distinguished CBS v. DNC, and held the First Amendment applicable to the licensee's actions. While the district court defined the "public forum" in that case to be limited to the televised political

[8] The United States District Court for Northenr District of Alabama has reched a different result on the basis of a similar set of facts. With all due respect, this Court takes a different view of the law in this case.

The Defendants' argument, in the final analysis, is based on a fundamental misunderstanding of the purposes of the Bill of Rights. The defendants stipulate that KUHT-TV and the University of Houston are "governmental entities," but then insist that the First Amendment does not aply to their activity. If KUHT-TV and the University of Houston are governmental entities, the First Amendment must apply to their activities. The protection afforded by that Amendment extends not so much to KUHT-TV's editorial decisions as it does to the right of viewers to be free of governmental control over the content of programs presented to them. The purpose of the First Amendment, as with the Bill of Rights in its entirety, is to protect the people from government, not government from teh people. See CBS v. DNC, supra, 412 U.S., at 139 n.7, 93 S.Ct., at 2105 n.7

(Justice Stewart, J., concurring). On the basis of these constitutional considerations, the Court finds that KUHT-TV, a government owned and operated TV station, is a public forum.

THE EXISTENCE OF A PRIOR RESTRAINT

Having determined that KUHT-TV is a public forum, the defendants' objections regarding the lack of a willing speaker in the present case become relevant. KUHT-TV's status as a public forum means that decisoins not to show programs on it may be challenged as prior restraint. It does not mean that decisions not to air programs on it are definitionally prior restraints. A restriant, prior or subsequent, can only exist where there is someone who is willing to speak. See Virginia State Board of Pharmacy, supra, 425 U.S. at 756, 96 S.Ct.,

at 1822.

The defendants maintain that the University of Houston is properly to to be viewd as the speaker in this case. As licensee of KUHT-TV, the defendants maintain, the University is oblitgated under the Communications Act to decide which programs will in its estimation, best serve teh public intrest. That statutorily prescribed role as program selector, the defendants argue, qualifies it for the role of "speaker." ASs the University isnot, without question, a "willing " speaker, the defendants maintain that the present case involves no prior restraint. The defendants insist that this action merely represents an attempt by the plaintiffs to foorce an unwilling speaker to speak.

The plaintiffs take the position that PBS is the speaker. PBS is the entity which distributed "Death of a Princess" for airing

on KUHT-TV and other public broadcasting stations across the country. It advertised the sowing of "Death of a Princess" an ddistributes the entire "World" series, of which "Death of a Princes" is simply one part. PBS distributed the program for airing an dKUHT-TV refused to televise it. In the plaintiffs' view, that makes PBS a willing speaker and KUHT-TV the implementor of a prior restraint.

The Court accepts the analysis of neither the plaintiffsd nor the defendants on this point. The requirements of the Communications Act do not make the UKniversity of Houston the speaker. At best, these requirements make it an editor of the works of other speakers and, has nbeen noted, its editorial discretion is limited by the application of the First Amendment. PBS, similarly, is not the speaker. Its charter and the Public Broad-

casting Act of 1967 make clear that it is intended to be a distribution mechanism only. It wa once the major program selector, but that role has since been limited ty the institution of the SPC. Moreover, even as program selector it originated no programs whatsoever and by now it is specifically prohibited by law from doing so. As operator of the power lines which bring programs to public stations, PBS acts merely as a middle man between the true speaker and the forum, KUHT-TV.

The true speaker, then, is the party or parties who originated the programming in question. It is their thoughts that are expressed in the program; it is their "speech" that is intended to be heard. WGBH Educational Foundation of Boston, Massachusetts, and ATV network of London, England, produced "Death of a Princess." It was their "speech" and it is clear that

they wanted it to be "heard".

This conclusion is by no means weakened by virtue of the fact that the University of Houston, through the SPC mechanism, paid the producers of a "Death of a Princess" for the rights to broadcast their show. That payment, in and of itself, did not give the University the right to prevent the show from being aied. Courts have repeatedl held that "[t]he state is not necessarily the unrestrained master of what it ... fosters." Bazaar v. Fortunate, 476 F.2d 570, 575 (5th Cir. 9173) quoting Antonelli v. Hammond, 308 F.Supp. 1329, 1337 (D.C. Mass. 1970).

Illustrative of this point is Brooks v. Auburn University, supra. There, the United States Court of Appeals for the Fifth Circuit Affirmed a lower court's order restraining the Auburn University president from preventing the Reverend William Sloan Coffin from appearing and speaking on campus

after he had been properly invited by a student organization. The Fifth Circuit's decree also required the University to pay Referend Sloan an agreed honorarium and travel expenses. Such expenses certainly did not make the University the speaker. As the district court stated, while Auburn was not required to allocate funds--either student fees or public funds--to pay invited speakers, "[h]aving allocated the money ... and having paid other speakers with no quaestions asked, Auburn may not in this instance, for no constitutionally acceptable reason, withhold the funds for the Reverend Mr. Coffin as a censorship device." Brooks v. Auburn University, 296 F.Supp 188, 198 (M.D. Ala. 1969).

Similarly, in the instant case the University may have paid the show's producers; it certainly did not, by that payment, become them. Nor did the fact that

a payment was involved convey to the University any greater right than it otherwise had to refuse to show the program on the basis of its content. As the cases indicate, the University of Houston is not obligated to own this public forum. it need not purchase programs to show on this public forum. But if it decides to do so, it cannot refuse to show such programs on the basis of the views they represent. As the Supreme Court has said "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of City of Chicago v. Mosley, supra, 408 U.S., at 9592 S.Ct. at 2290.[9]

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[9] Even if the payment by KUHT-TV somehow made a difference and in effect rendered the station the "unwilling speaker" which it claims to be, that analysis might forestall, but would not entirely foreclose, this Court's conclusion that KUHT-TV has engaged in prior restraint in refusing to air a program because of its content. The same issues would arise if the producers of "Death of a Princess"--or any other "controversial" show--offered their program for free. Far from being an unlikely sscenario, the determination of whether or not to air programs other than those produced or paid for directly by KUHT-TV presents a problem that is bound to arise with disturbing regularity.

WBGH Educational Foundation and ATV network of London created and produced "Death of a Princess" and, through the SPC mechanism offerd the Rights to broadcast it to the University of Houston. The University of Houston bought those rights, but but refused to show the program on KUHT-TV, the public forum television station which it owned and operated. That action , the defendants admit, was based on the content of the program. Consequently, as the Supreme Court has made clear, see Conrad, supra 420 U.S. , at 552-558, 95 S.Ct. at 1243-1246, that action must be labeled a prior restriant.

THE INVALIDITY OF THE PRIOR RESTRAINT

Although the fact that the decision not to show "Death of a Princess" constituted a prior restraint "does not end the inquiry." Conrad, supra, at 559, 95 S.Ct. at 1246, it does place an extremely heavy burden on the defendants. "Any system of prior restrain-

of expression comes to this Court bearing a heavy presumptivon against it constitional validity." New York Times Company v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed..2d 822 (1971); Carroll v. President & Commissioners of Princess Anne, 393 u.S. 175, 181, 82 S.Ct. 347, 351, 21 L.Ed. 2d 325 (1968);Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). The defendants in the present case have failed to overcome that presumption.

[5] In order for a prior restraint to be lawful, it must fulfill certain substantive and procedural requirements. It "first must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accompolished with procedureal safeguards that reduced the danger of suppressing constitutionally protected speech." Conrad, supra, 420 U.S. at 559, 95 S.Ct., at 1247. The restraint at issue in the present case fails to meet either requirement.

The only conceivable exception which the decision not to show "Death of a Princess" might arguably fit is the national security exception discussed in New York Times Company v. Uniuted States, supra, As the Supreme Court first stated n Near v. State of Minnesota, 283 U.S. 697, 716, 51 s.Ct. 625, 631, 75 L.Ed. 1357 (1931) (dictum), in time of war "[n]o one would question but that a government might prevent actual obstruction of its recruiting service or the publication of sailing dates of transports by the nubmer and location of troops." Dr. Nicholson testified numerous times that his major reason for cancelling the showing of "Death of a Princess" was his concern that airing the show might "exacerbate the situation" in the Middle East. He was asked repeatedly to explain precisely what he meant by this phrase and was entirely unable to do so. The showing he made in regard to the national security exception

was unacceptable as a matter of law. The Court cannot ignore the fact that "Death of a Princess" was aired in most of the other 285 public television stations as originally scheduled. Notwithstanding those showings, Dr. Nicholson, with the benefit of the 20/20 vision which hindsight affords, was unable to explain how the airing of "Death of a Princess" could have threatened this nation's national security.

Of course, even if the showing of "Death of a Princess' had, in fact, involved a threat to the national security, the prior restraint imposed in this case would not meet constituional standards because it was not accomplsihed with the procedural safe-safeguards required by the First Amendment. The defendants did not meet their burden of instituting judicial proceedings and proving that the material was in fact dangerous to

the national security. The restraint imposed prior to judical review was not imposed only for a specified brief period of time for the purpose of preserving the status quo. Neither was a prompt, final judicial determination assured. See Conrad, supra, 420 U.S. at 558-563, 95 S.Ct., at 1246-1248. It was, therefore, invalid on both procedural and substantive grounds.

CONCLUSION

The issue which has been presented to the Court, simply stated, is whether a state, albeit operating in the capacity of a state owned and operated telvision station, is somehow excused from recongnizing the protections of the First Amendment. The Court refuses to carve out such an exception to the Bill of Rights. To do so would in effect encourage the planting of seedlings which, upon attaining full growth, would install the State of Texas, through its University of Houston, as a kind of "Ministry of Truth" as portended in George Orwell's 1984. See Orwell, 1984 (Harcourt & Bruce 1949). Such absolute control over what the people may see and hear will not be countenanced in 1980.

This decision should not be viewed as an attempt by this Court to thrust itself into the business of operating a television

station. That business is properly reserved to those entities duly licensed by the FCC, yet it is a business which cannot be conducted in a constitutional vacuum. The operation of KUHT-TV, although perhaps now made more difficult by this decision, must be performed within the confines of the First Amendment. A balance must be struck and in this case the scales are weighted in favor of the First Amendment rights of persons who reasonably expect to view programs free of government censorship

It cannot be emphasized enough that this is not a case involving the privately owned and operated media. Rather, this case involves an attempt by the state to control what people see and deprive them of their right to receive information. The people of this country have a First Amendment right

to see and hear without having their sights and sounds subjected to the censorship of those wrapped in the cloak of the state, particularly when those state officials are acting on the basis of their personal political predilections.

Having determined that the decision not to show "Death of a Princess" violated the constitutional rights of the plaintiffs in this case, there is only one appropriate remedy--to order that the "Death of a Princess" be shown on KUHT-TV. Such an order, however, is not one which this Court takes lighly. No one is more aware than this official determining what can and cannot be said. But here a governmental official, in violation of the First Amendment, has already done that. After much deliberation it is the conclusion of this Court that the decision of Dr.Nicholson not to show "Death of a Princess," like the

decision to show the municipal board in Conrad, supra, not to show "Hair," must be overturned by judicial order.

The "Death of a Princess" was scheduled for viewing on May 12, 1930, at 8:00 p.m. That censorship, contrary to the very essence of the First Amendment prohibition against prior restraints, has now lasted for seven months. It must not be permitted to last any longer. KUHT-TV is hereby ORDERED to air "Death of a Princess" in its entirety within thirty (30) days of the date of this Order at a time comparable to that which was originally scheduled.

Gertrude BARNSTONE and Harvey Malyn, Plaintiffs-Appellees,

v.

The UNIVERSITY OF HOUSTON, KUHT-TV, et al., Defendants-Appellants.

No. 81-2011.

United States Court of Appeals, Fifth Circuit.*
Unit A

Oct. 30, 1981.

Rehearing En Banc Granted Nov. 16, 1981. See 662 F.2d 1110.

*Former Fifth Circuit case, Section 9(1) of Public Law 96.452--October 14, 1980.

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

PER CURIAM:

On May 1, 1980, KUHT-TV, a station owned and operated by the University of Houston, announced that it would not air the controversial program, "Death of a Princess," which it had previously scheduled to show on May 12, 1980. Gertrude Barnstone, a resident of Houston, a subscriber to KUHT-TV, and a regular viewer of its offerings, brought this action seeking to compel the station to air the program. On the morning of May 12, the district court entered a written "temporary restraining order" requiring KUHT-TV to show "Death of a Princess" that evening. 487 F.Supp. 1347 (S.D.Tex.1980). That afternoon, we vacated the order on the condition that the defendants "tape and preserve the program in issue." No. 80-1527 (5th Cir. May 12, 1980). That evening, the Supreme Court refused to vacate our order. 446 U.S.

1318, 100 S.Ct. 2144, 64 L.Ed.2d 488 (1980) (Powell, Circuit Justice).

After a full trial on the merits, the district court entered an order requiring the station to telecast "Death of a Princess" within thirty days. 514 F.Supp. 670 (S.D.Tex.1980). We stayed that order pending this appeal. No. 81-2011 (Jan. 14, 1981). We now reverse and instruct the district court to dissolve the injunctive relief it granted.

The district court held that KUHT-TV is a "public forum" as that term is used in First Amendment jurisprudence, see Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975), and that therefore it could not deny access to speakers -- here, the producers of "Death of a Princess" -- who wished to be heard in the public forum, unless its reasons for doing so could withstand the rigorous scrutiny to which "prior

restraints" are traditionally subjected. 514 F.Supp. at 689-91. Appellees defend this holding, and they also defend the district court's order on the ground that KUHT-TV's decision was based on the political content of the program. Both of these arguments were recently considered and rejected by this court in Muir v. Alabama Educational Television Commission, 656 F.2d 1012, 1020, 1023 (5th Cir. 1981 We are bound by the decision in Muir.

Thus, the judgment of the district court is REVERSED. The district court shall dissolve the injunctive relief and render judgment for appellants.

REVERSED and REMANDED.

REAVLEY, Circuit Judge, concurring:

I join in the panel's opinion because I agree that we are bound by Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981). I write

separately, however, to express my disagreement with the reasoning of the Muir panel.

The Muir panel has concluded that a government-owned television station is protected by the First Amendment.[1] As far as I know, this holding has no precedent in American constitutional jurisprudence. "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." CBS, Inc. v. Democratic National Committee, 412 U.S. 94, 139, 93 S. Ct. 2080, 2104-05, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) (emphasis in orginal).[2] While I

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[1]See Muir, 656 F.2d at 102 ("AETC's refusal to broadcast 'Death of a Princess' is itself constitutionally protected"); id. at 1023 (court inquiry into whether program was cancelled on the basis of its political content "is not only undesirable, it is constitutionally prohibited"); id. at 1026.

[2]There is nothing to the contrary in the Supreme Court's opinion in CBS. The question in CBS was whether the First Amendment confers on private citizens an affirmative right of access to

have no doubt that the government has the power to exercise "editorial discretion" over its own speech, this power is neither conferred nor protected by the First Amendment; if the First Amendment has any relevance to the power at all, it serves only to limit the power.

By holding that a government broadcaster's editorial discretion is entitled to the near-absolute constitutional protection recognized in Miami Herald Publishing Co. v.

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the facilities of private broadcasters. See 412 U.S. at 97-98, 93 S.Ct. at 2084. While the Court "assum[ed] governmental action" for purposes of its First Amendment analysis, id. at 121, 93 S.Ct. at 2096, its preservation of First Amendment protection for private broadcasters in performing this analysis is not precedent for conferring First Amendment protection on the government. Had the Court "assumed" that the private broadcasters were government for all intents and purposes, then the Court would not have asserted that it was denying the claimed First Amendment right of access because the result would be "an enlargement of Government control over the content of broadcast discussion of public issues." Id. at 126, 93 S.Ct. at 2098. Had the government already been fully in control, then there could be no "enlargement" of its control. As two of the five Justices who "assumed governmental action" made clear, "[w]hen governmental action is alleged there must be cautious analysis of the quality and degree of Government relationship to the particular acts in question." Id. at 115, 93 S.Ct. at 2093 (Burger, C.J., joined by Rehnquist, J.). In CBS, the "governmental action" was merely FCC licensure of privately-owned stations; in this case, the government owns the station and thus has the ability to completely control its programming.

Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (striking down statute giving politicians "right of reply" access to newspapers), see Muir, 656 F.2d at 1023, the Muir panel has afforded government broadcasters more protection from private citizens than private broadcasters have from the government. See CBS, Inc. v. FCC, 101 S.Ct. 2813, 2829-30 (1981) (upholding politicians' statutory right of access to private television networks); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-92, 89 S.Ct. 1794, 1804-08, 23 L.Ed.2d. 371 (1969).[3] This is an "'unusual order of First Amendment values'"[4] indeed.

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[3][A]lthough the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, Miami Herald ..., it affords no such protection to broadcasters... FCC v. Pacifica Foundation, 438 U.S. 748, 26, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073 (1978) (emphasis added).

[4]Muir, 656 F.2d at 1016 (quoting CBS, Inc. v. Democratic Nat'l Comm. 412 U.S. at 101, 93 S.Ct. at 2086.

I have no quarrel with the Muir panel's conclusions that a government-owned television station is not a "public forum" and that the public has no "right of access" to such a station.[5] But I do not think that the primary issue in this case or in Muir is whether the station is a "public forum," because I do not think the plaintiffs' primary claim is that they have a right to put anything they demand on the air.[6] Rather,

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[5] I have a bit more trouble with the Muir panel's assertion that "[t]here is no evidence here that the government of Alabama had anything whatever to do with AETC's decision [to cancel 'Death of a Princess']. In sum, the present record reflects no basis for a fear that the government of Alabama is 'really operating the electronic press' ...." 656 F.2d at 1018 (quoting CBS, 412 U.S. at 143, 93 S.Ct. at 2106 (Stewart, J., concurring)) (footnote omitted). The Muir panel backs up this assertion by claiming that "[t]he record does not establish... that AETC is an 'agency' of [the state]." 656 F.2d at 1018 n 11. Since the Muir panel cites an Alabama state providing that "[t]here is hereby created an agency to be known as the Alabama educational television commission ...," 656 F.2d at 1014 n1, this latter claim and its relevance to the rule established in Muir is perplexing, to say the least.

[6] Thus, I think it may have been unnecessary to reach the "public forum" issue in these cases. Since the issue is now settled by Muir, however, I think it appropriate to set out what I believe is the proper basis for the Muir court's

they are complaining that a particular program, already scheduled to be shown and already paid for with the public's money, was

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holding on the "public forum" issue.

The Supreme Court has recently rejected the theory, adopted by the court below, see 514 F.Supp. at 685, that because a government facility is "specifically used for the communication of ideas or information," it is ipso facto a public forum. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns. --- U.S. ---, 101 S.Ct. 2676, 2685 n.6, 69 L.Ed.2d 517 (1981) (mail boxes). The district court should have paid closer attention to the test established by this court for determining whether a public facility is a "public forum":

> "does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance."

Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016, 1019 (5th Cir. 1972) (quoting Wolin v. Port of New York Auth., 392 F.2d 83, 89 (2d Cir.), cert. denied, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968)) (emphasis added). In the cases in which "public forum" treatment has been afforded, the speakers were attempting to use the public facility in a manner fully consistent with "the pattern of usual activity" and "the general invitation extended." See, e.g., Hague v. CIO, 307 U.S. 496, 515-16, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.) (streets and parks); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975) (rental of public auditorium normally rented out for such uses) ("Petitioner was not seeking to use a facility primarily serving a competing use."). The pattern of usual activity at KUHT-TV, by contrast, is for professional programmers to do the program ming; the general invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered.

cancelled by state officials because they did not like its political content. See Muir, 656 F.2d at 1014; see id. at 1027-29 (Clark, J., dissenting); Barnstone, 487 F.Supp. at 1349; 514 F. Supp. at 674.

Thus, the primary question is whether the cancellation "abridg[es] the freedom of speech." U.S.Const., amend. 1. The First Amendment does not talk primarily in terms of "freedom of speakers," and Supreme Court jurisprudence over the past twenty years makes it clear that identifying the speaker should not be the primary focus of our inquiry.[7] Instead, we should

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[7] In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the Supreme Court struck down a law restricting corporate contributions and expenditures for the purpose of advocating any political position. In so doing, the Court found it completely unnecessary to decide whether corporations are speakers who "have" First Amendment rights. "Instead," the Court said, "the question must be whether [the state's law] abridges expression that the First Amendment was meant to protect." Id. at 776, 98 S.Ct. at 1415; see id. at 775-86, 98 S.Ct. at 1415-21; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346 (1976) (consumers have standing to challenge restrictions on pharmacists' speech) ("the protection afforded is to the communication, to its source and its recipients both"); Lamont v. Postmaster General, 381

determine whether the government's action here was an "abridgment" that is forbidden by the First Amendment.

I confess the strangeness of the idea that the government may "abridge" freedom of speech when it reverses its decision to send out a message that it could simply have declined to send out in the first place. The idea is, however, established by the precedents of this court. We have held in the past that once the government makes a facility available for a particular speaker, it may not deny the use of the facility to the speaker because it objects to the contents of his message. See Bazaar v. Fortune, 476 F.2d 570, 574 (student literary magazine) ("once a [state] recognizes a[n].....activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitional guarantees"),

U.S. 301, 305-07, 85 S.Ct. 1493, 1495-96, 14 L.Ed.2d 398 (1965) (First Amendment protects the "unfettered" right to receive political messages sent through the mail).

aff'd as modified en banc, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995 94 S.CT. 2409, 40 L.Ed.2d 774 (1974) Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969) (requiring, in a suit by disappointed listeners, a state university to pay an honorarium and travel expenses to a speaker whose invitation was withdrawn by the university president because of what the speaker might say). The Muir panel neither cites nor distinguishes these precedents.

The station and the amici raise the fear that the slightest judicial scrutiny will result in court supervision of their regular programming decisions. I share their concern. But this case is not a challenge to the station's general pattern of programming or its failure to select any particular program for programming: rather, plaintiffs charge that a program already selected, paid for, and scheduled to be aired by the station's professional programmer was cancelled by a state

official[8] because of the allegations the program made against the government of Saudi Arabia. See 514 F.Supp. at 674. To my mind, this case is quite similar to the case in which a librarian places a book on the library shelf, only to have it removed by supervisory authorities because they object to the political views it contains. The clear majority of the courts that have considered this issue have agreed that the state may remove the book for any number of reasons, but a desire to silence its political message is not one of them. See Pico v. Board of Education, 638 F.2d 404 (2d Cir. 1980), cert. granted, --- U.S. ---, 102 S.Ct. 385, 70 L.Ed.2d 205 (1981)(while

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[8]In this case, to telecast "Death of a Princess" had been made by KUHT-TV's full time director of programming. The decision to cancel was made by the school's Vice President for Public Information and University Relations, who had full responsibility for the operation of the station, but who had never before, in 17 years, made a programming decision. His decision was opposed by the programm director and, eventually, by the general manager of KUHT-TV. See 514 F.Supp. at 673-74.

removal of books from school library shelves in itself, or even removal because such books are "tasteless" or "offensive," is not a First Amendment violation, removal because of political ideas the books express is unconstitutional); Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1308 (7th Cir. 1980)(dictum) (if complaint alleges removal of books in an effort to exclude a particular type of thought, it states a claim); Minarcini v. Strongsville City School District, 541 F.2d 577, 582 (6th Cir. 1976); Salvail v. Nashua Board of Education, 469 F.Supp. 1269, 1274 (D.N.H. 1979) (removal of "Ms." magazine because of its feminist political viewpoint); Right to Read Defense Committee v School Committee 454 F.Supp. 703, 712 (D.Mass. 1978);[9] cf.

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9. I note that the above sited cases all involve school libraries; I would assume, as a general matter, that the school board has, if anything, broader discretion in determining the political content of materials selected for school children than the government broadcaster has in selecting offering for the general public. See Ambach v. Norwick, 441 U.S. 68, 76-79, 99 S.Ct. 1589, 1594-96, 60 L.Ed.2d 49 (1979).
My reliance on these cases, however, implies no endorsement of the varying "tests" and reasoning they

Sefick v. City of Chicago, 485 F.Supp. 644, 651 (N.D.Ill.1979)(once city had given artist permit to exhibit his work in a public building, it could not revoke the permit on the ground that the work satirized the mayor.

Freedom of speech concerning public issues "is at the heart of the First Amendment's protection."[10] Therefore, I believe that the primary inquiry in this case

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contain. For reasons I explain below, see note 11 infra, I would not put the initial burden on the government broadcaster to explain its every "questionable" decision, as some of these cases apparently do. See, e.g., Pico v. Board of Educ., 638 F.2d at (Sifton, J.); Minarcini v. Strongsville City School Dist., 541 F.2d at 582. Moreover, the government broadcaster undoubtedly has much broader discretion to cancel "offensive" material than some of the cited cases concede to the school board. Compare right to Read Defense Comm. v. School Comm. 454 F. Supp at 712, with FCC v. Pacifica Foundation, 438 U.S. 726, 748-51, 98 S.Ct. 3026, 3039-41 57 L.Ed.2d 1073 (1978)(First Admendment does not prevent government from restricting the broadcast of "indecent" and "offensive" material). Rather, I rely on these cases because they all expressly or implicitly support what I thought was a universally-held position: that the government cannot act against speech because of its political content.

[10] First Nat'l Bank of Boston v. Bellotti, 435 U.S. at 776, 98 S.Ct. at 1415; see Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966) ("there is practically

be whether the government has attempted to silence a message because of its political content. If the plaintiffs can establish this, then the government's decision is presumptively unconstitutional. See L. Tribe, American Constitutional Law § 12-2, at 581 (1978). If the government can establish that, regardless of its impermissible motive, it would have cancelled the program for legitimate reasons, then it is, in my view, entitled to judgement. See Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2 471 (1977).[11]

universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs"); Garrison v. Louisiana, 379 U.SA. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government").

[11] I think that the Mt. Healthy test the proper one to apply in the government broadcasting context. Just as the Mt. Healthy Court was attempting to strike a balance between the state's authority as employer and the employee's First Amendment rights, we must here strike a balance between the states's ability to run its public broadcasting station and the protection of "the freedom of speech. If we were to require the government broadcaster to justify its every programming decision, we would makit impossible for government-run PBS stations to operate. The result would be a diminution in the variety and quality of the programs offered, a result contrary to the goals of the First Amendment. See

Since Muir forecloses this inquiry, I do not say what the result of the inquiry would be in the case before us. I recommend the inquiry because I fear that these cases involve not only the "Death of a Princess," but the wounding of a principle.

END

For the same reasons, I would require the state to justify its decision with legitimate, not "compelling," reasons. I can think of several such reasons in the broadcasting context: because the program is offensive, see note 9 supra, because it makes allegations that are defamatory, false, or misleading, because a superior or more popular program becomes available. In this case, the district court found that the responsible university official "may have" decided to cancel the program out of concern for the safety of a professor who was in Saudi Arabia working as a tutor. See 514 F.Supp. at 675; see also Muir, 656 F.2d at 1019 (claim of threat to well-being of Alabama citizens in the Middle East). If the state could prove that its concern had some basis and that the concern was truly a reason for its decision, then I would not require it to wait to cancel the show until a gun was put to the professor's head.

Donald E. MUIR, H. Jeff Buttram, and
O. Navarro Faircloth,
Plaintiffs-Appellants,

V.

ALABAMA EDUCATIONAL TELEVISION COMMISSION:
Jacob Walker, etc., et al.,
Defendants-Appellees.

Gertrude BARNSTONE and Harvey Malyn,
Plaintiffs-Appellees,

V.

The UNIVERSITY OF HOUSTON,
KUHT-TV, et al.,
Defendants-Appellants.

Nos. 80-7546, 81-2011.

United States Court of Appeals,
Fifth Circuit*

Oct. 15, 1982.

*Former Fifth Circuit case, Section
9(1) of Public Law 96-452--
October 14, 1980

Before BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, GARZA**, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges***

JAMES C. HILL, Circuit Judge:

I. Introduction

The two appeals before this Court on consolidated rehearing raise the important and novel question of whether individual viewers of public television stations, licensed by the Federal Communications Commission to state instrumentalities, have a First Amendment right to compel the licensees to broadcast a previously scheduled program which the licensees have decided to cancel. For the reasons stated below we find that the viewers do not have such a right.

**Judge Garza participated in the hearing but took senior status on July 7, 1982 and is no longer qualified to participate in the en banc decision.

Judges Jolly and Higginbotham joined the Court after submission and oral argument but do not choose to participate.

***John C. Godbold, Chief Judge, did not participate in the consideration or decision of the case.

Both cases before us concern the decisions of the licensees not to broadcast the program "Death of a Princess." In Muir v. Alabama Educational Television Commmission, 656 F.2d 1012 (N.D. Ala. 1980), the District Court for the Northern District of Alabama denied the plaintiff viewers' motion for a preliminary injunction requiring the defendant licensee, Alabama Educational Television Commission (AETC), to broadcast the program. The district court found: (1) that the likelihood of success on the merits criterion for an injunction had not been shown; (2) that the First Amendment protects the right of broadcasters, private and public, to make programming decisions free of interference; and (3) that viewers have no First Amendment right of access to the Alabama educational television network sufficient to compel the showing of "Death of a Princess." The court granted summary judgment for AETC.

In Barnstone v. University of Houston, 514 F.Supp. 670 (S.D. Tex. 1980), the District Court for the Southern District of Texas reached a different conclusion and granted the injunction requested by the plaintiff viewers and ordered the defendant licensee, University of Houston, to broadcast the program. The court held that KUHT-TV, the television station operated by the university, was a public forum and as such it could not deny access to speakers --here, the producers of "Death of a Princess"--who wished to be heard in the public forum, unless its reasons for doing so could withstand the rigorous scrutiny to which "prior restraints" are traditionally subjected.

On appeal a panel of this court affirmed the District Court's decision in Muir.[1] The panel held that the plaintiffs had no constitutional right to compel

[1]Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981)

the broadcast of "Death of a Princess," and that AETC's refusal to broadcast the program was a legitimate exercise of its statutory authority as a broadcast licensee and was protected by the First Amendment. In Barnstone another panel of this court found that the decision in Muir required that the panel reverse the judgment of the District Court for the Southern District of Texas and dissolve the injunctive relief which had been granted the plaintiffs.[2]

We directed that both cases be consolidated and reheard en banc. We now affirm the judgment of the District Court for the Northern District of Alabama in Muir and reverse the judgment of the District Court for the Southern District of Texas in Barnstone.

II. Factual Background

The Muir case arose when AETC decided not to broadcast "Death of a Princess,"

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[2] Barnstone v. University of Houston, 660 F.2d 137 (5th Cir. 1981).

which had been scheduled for broadcast on May 12, 1980 at 8:00 P.M. The program, one of thirteen in a series "World," is a dramatization of the investigation by the program's director, producer and co-author into the motivations and circumstances which were said to have led to the July 1977 execution for adultery of a Saudi Arabian princess and her commoner lover.[3]

AETC, organized under Ala. Code § 16-7-1, is responsible for "making the benefits of educational television available to and promoting its use by inhabitants of Alabama" and has "the duty of controlling and supervising the use of channels reserved by the Federal Communications Commission to Alabama for noncommercial, educational use." Ala. Code § 16-7-5. AETC operates a statewide network of nine noncommercial,

[3]"Death of a Princess" was produced jointly by WGBH Educational Foundation, licensee of public television station WGBH-TV in Boston, Massachusetts, and ATV Network of London, England.

educational television stations licensed by the Federal Communications Commission under the Communications Act of 1934 (47 U.S.C. §§ 151, et seq.). AETC is funded through state legislative appropriations from the Special Education Trust fund, matching federal grants through the Corporation for Public Broadcasting (CPB), and private contributions.

AETC is a member of the Public Broadcasting Service (PBS), a non-profit corporation distributing public, non-commercial television programs to its members by satellite. AETC is also a member of the Station Program Cooperative (SPC), a program funding and acquisition mechanism operated by PBS. Membership in SPC entitles licensees to participate in the selection and funding of national public television programs distributed by PBS. Only those licensees who contribute to a program's cost have a right to broadcast it. Those who contribute are free to broadcast or not to

broadcast the program.[4]

PBS's acquisition of the program series "World" was funded by 144 public television licensees, including AETC, through the SPC. During the week prior to the scheduled broadcast of "Death of a Princess" AETC received numerous communications from Alabama residents protesting the showing of the program. The protests expressed fear for the personal safety and well-being of Alabama citizens working in the Middle East if the program was shown. On May 10 AETC announced its decision not to broadcast the film as scheduled.

Appellants, Muir, Buttram and Faircloth, residents of Alabama who had planned

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[4]PBS's "Station Users Agreement" reposing in licensees the absolute right to select programs they will broadcast and to determine when they will broadcast them accords with the FCC regulation contained in 47 C.F.R. § 73.658(e) which requires that every broadcaster reserve the right to reject any program offered to it. The FCC requires that every broadcaster consistently maintain independent control over selection of programs as a condition to retention of a license. Cosmopolitan Broadcasting, 59 F.C.C.2d 558(1976). See p. 1040 infra.

to watch "Death of a Princess," brought this action on May 12, 1980 under the First and Fourteenth Amendments and 42 U.S.C. § 1983, seeking to compel AETC to broadcast the film, and preliminary and permanent injunctions against AETC's making "political" decisions on programming.

The Barnstone case arose in a factual context similar to that of Muir. The University of Houston is a co-educational institution of higher learning funded and operated by the State of Texas. See Tex. Educ. Code Ann. §§ 111.01 et seq. The university funds and operates KUHT-TV, a public television station licensed to the university by the F.C.C. As a member of the SPC, KUHT-TV contributed to the funding of the "World" program series. KUHT-TV scheduled "Death of a Princess" for broadcast on May 12, 1980 at 8:00 P.M.

On May 1, 1980 KUHT-TV announced that it had decided not to broadcast the pro-

gram. This decision was made by Dr. Patrick J. Nicholson, University of Houston Vice-President for Public Information and University Relations. Dr. Nicholson had never previously made a programming decision such as this, though as the university official charged with the responsibility of operating KUHT-TV he had the power to do so. In a press release announcing the cancellation Dr. Nicholson gave the basis of his decision as "strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the Middle East, our long friendship with the Saudi government and U.S. national in-

terests all point to the need to avoid exacerbating the situation." Dr. Nicholson also expressed a belief that the prgram was not balanced in a responsible manner.[5]

Upon learning of Dr. Nicholson's decision, on May 8, 1980, plaintiff Barnstone brought suit to require KUHT-TV to air "Death of a Princess."[6] Ms. Barnstone argued that as a subscriber to and regular viewer of KUHT-TV her First and Fourteenth Amendment rights were violated by the decision to cancel the program.

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[5]In addition to the reasons cited in the press release, the District Court, upon consideration of Dr. Nicholson's testimony, found four other reasons why the cancellation decision may have been made. First, Dr. Nicholson testified that he considered the program to be "in bad taste." Second, Dr. Nicholson expressed concern that some members of the public might believe that the "docu-drama" was a true documentary. Third, Dr. Nicholson testified that the University of Houston had previously entered into a contract with the Saudi Arabian royal family to instruct a particular princess. Finally, Dr. Nicholson testified that he had been in charge of fund raising activities for the university from 1957-1978 and that a significant percentage of the university's private contributions came from major oil companies and from individuals in oil related companies.

[6]Harvey Malyn was subsequently granted leave to join this action as a party-plaintiff.

III. The First Amendment Does Not Prohibit Governmental Expression

The central argument advanced by the plaintiffs on appeal is that their First Amendment rights were violated when the defendants, as state actors, denied the plaintiffs an opportunity to view "Death of a Princess" on the public television stations operated by the defendants. We are thus called upon to determine whether the First Amendment rights of viewers impose limits on the programming discretion of public television stations licensed to state instrumentalities.

[1-3] The First Amendment operates to protect private expression from infringement by government. Such protection applies both to the right to speak and the right to hear and is operative in a variety

contexts.[7] The amendment prohibits government from controlling or penalizing expression which has been singled out by government because of the expression's viewpoint.[8] The First Amendment also prohibits government from taking certain actions which impermissibly constrict the flow of information or ideas.[9]

[4] The plaintiffs emphasize that the protection of the First Amendment extends only to private expression and not to governmental expression. They assert that the amendment serves only to confer duties on government--not rights.[10] While this

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[7]See L. Tribe, American Constitutional Law, 580-584 (1978).

[8]See Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-2290, 33 L.Ed.2d 212 (1972); New York Times Co. v. Sullivan, 376 U.S. 254, 269-270, 84 S.Ct. 710, 720-721, 11 L.Ed.2d 686(1964).

[9]See Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939).

[10]Plaintiffs invoke Justice Stewart's holding in Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94, 139, 93 S.Ct. 2080,2104, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) that "[t]he First Amendment protects the press fro governmental interference, it confers no analogous protection on the Government."

argument of the plaintiffs may be essentially correct it in no way resolves the issue before us. To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government. Even without First Amendment protection government may "participate in the marketplace of ideas," and "contribute its own views to those of other speakers." Community Service Broadcasting v. F.C.C., 593 F.2d 1102, 1110 n.17 (D.C. Cir. 1978).[11] As Justice Stewart aptly noted in Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S.94, 139, n.7, 93 S.Ct.2080, 2105, n.7, 36 L.Ed.2d 772 (1973)(Stewart, J., concurring) (hereinafter CBS), "[g]overnment is not restrained by the First Amendment from controlling its own expres-

[11] See L. Tribe American Constitutional Law, 588-590 (1978); P.A.M. News Corp. v. Butz, 514 F.2d 272 (D.C. Cir. 1975).

sion... '[t]he purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.'"[12]

Our essential task thus does not center on determining whether AETC and the University of Houston are vested with a First Amendment right to make the programming decisions which they made regarding "Death of a Princess." In the absence of a violation of a constitutional right inhering in the plaintiffs, AETC and the University of Houston are free to make whatever programming decisions they choose, consistent with statutory and regulatory require-

[12]Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression. Yet there is nothing to suggest that, absent such limitation, government is restrained from speaking any more than are the citizens. Freedom of expression is the norm in our society, for government (if not restrained) and for the people. Freedom of speech is not good government because it is in the First Amendment; it is in the First Amendment because it is good government.

ments. The fundamental question before us is whether in making the programming decisions at issue here, the defendants violated the First Amendment rights of the plaintiffs.

IV. The Regulatory Framework Enacted by Congress

Our inquiry into the constitutional issue at hand is aided by a brief review of the broadcast legislation enacted by Congress.[13]

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[13]The Supreme Court in CBS observed that First Amendment issues regarding broadcast licensees should be analyzed in light of the Congressionally established statutory and regulatory scheme:

> "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For during that time Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned."

412 U.S. at 102, 93 S.Ct. at 2086. The Court went on to point out:

> That is not to say we 'defer' to the judgment of the Congress and the Commission on a constituonal question, or that we would hesitate to invoke the constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Id. at 103, 93 S.Ct. at 2086.

Such a review reveals an attempt by Congress to establish a regulatory system that accommodates the First Amendment interests of the public and of the private broadcast licensees and, it appears, the interests of government broadcast licensees unless otherwise limited by proper legislation.[14]

Prior to 1927 the allocation of broadcast frequencies was left entirely to the private sector and the result was "chaos." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375, 89 S.Ct. 1794, 1798, 23 L. Ed.2d 371 (1968)(hereinafter Red Lion). It quickly became apparent that governmental regulation of the electromagnetic spectrum was essential if the spectrum was to be optimally utilized. "Without government con-

[14]Extensive discussion of the history of broadcast regulation is found in CBS at 103-104, 93 S.Ct. at 2086-2087. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-386, 89 S.Ct. 1794,1789-1804, 23 L.Ed.2d 371 (1968); National Broadcasting Co. v. United States, 319 U.S. 190, 210-17, 63 S.Ct. 997, 1006-09, 87 L.Ed. 1344 (1943).

trol, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard." Red Lion, 395 U.S. at 376, 89 S.Ct. at 1799. Congress was confronted with a fundamental choice between total governmental ownership and control of the broadcast media--the choice of most other countries--or some other alternative. The decision of Congress to establish a system of broadcast licensing rather than government monopolization reflects "a desire to maintain for licensees so far as consistent with necessary regulation a traditional journalistic role." CBS, 412 U.S. at 116, 93 S.Ct. at 2093 (Burger, C.J., writing for three members of the court). Congress was, however, cognizant of the fact that the Nation's airwaves are a public resource not subject to private ownership. Thus, in enacting a regulatory scheme for the broadcast media, Congress was sensitive to the

need to protect the rights of the public. The Court in Red Lion aptly noted that because of the scarcity of radio frequencies Congress is permitted to legislate a licensing regime which limits the number of people allowed to broadcast, but that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806. The Court went on to observe that the purpose of the First Amendment in the context of broadcasting is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Id. at 390, 89 S.Ct. at 1806.

Congress thus enacted the Radio Act of 1927 which established the Federal Radio

Commission to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity.'[15] The Radio Act of 1927 was not only protective of the First Amendment interests of the public but it also recognized and sought to protect the First Amendment interests of broadcast licensees. The Court in CBS, 412 U.S. at 105, 93 S.Ct. at 2087, observed that in enacting this legislation "Congress chose to leave broad journalistic discretion with the licensees." The Court noted further that "Congress specifically dealt with and firmly rejected the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." Id.

The Communications Act of 1934, 47 U.S.C. §§ 151 et seq., the successor to the Radio Act of 1927, was similarly designed

[15]Radio Act of 1927 § 4,44 Stat.1163.

by Congress to promote a balance between the First Amendment interests of the public and of the broadcast licensees. In furtherance of the First Amendment rights of the public the Communications Act specifically mandates that the Federal Communications Commission consider the public interest in the course of granting licenses, 47 U.S.C. §§ 307(a), 309(a) renewing them, 47 U.S.C. § 307; and modifying them.[16] The FCC is also required to consider the public interest in promulgating rules and regulations governing the use of broadcast licenses. 47 U.S.C. § 303.

In affirming the First Amendment interests of broadcast licenses § 3(h) of the Communications Act specifically provides that broadcast licensees are not to be

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[16] The "public interest" includes the First Amendment interest of the public to receive "suitable access to social, political, esthetic, moral, and other ideas and experiences ..." Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806.

deemed common carriers.[17] The Court in CBS observed that this along with other provisions "evince a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." CBS, 412 U.S. at 109, 93 S.Ct. at 2089.[18] The FCC has, consequently, fulfilled its statutory obligations by promul-

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[17] Section 3(h) provides as follows:

'Common carrier,' or 'carrier' means any person engaged as a common carrier for hire in interstate or foreign communication by wire or radio or in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.
47 U.S.C. § 153(h).

[18] See also FCC v. Midwest Video Corp., 440 U.S. 689, 705, 99 S.Ct. 1435, 1443, 59 L.Ed.2d 692 (1979).
"As we see it § 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop a "nondiscriminatory system for controlling access ... is precisely what Congress intended to avoid through §3(h) of the Act."

gating regulations which view licensees as having the sole right and nondelegable responsibility to select the programs to be broadcast.[19] The Court in Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917,921 (D.C. Cir. 1978), pointed out that:

> A basic premise of Commission policy is that a licensee is a 'trustee' for the public and that he must therefore assume the 'primary duty and privelege to select the material to be broadcast to his audience ...' [cites omitted] 'The Commission has always regarded the maintenance of control over programming as a most fundamental obliga-

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[19] The most salient example is section 73.658(e) of the Commission's rules which provides:

> No license shall be granted to a television broadcast station having any contract, agreement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest or (2) substituting a program which, in the station's opinion is of greater local or national importance.

47 C.F.R. § 73.658(e)

tion of the licensee.' 'cites omitted]

Public television licensees are generally subjected to the same regulatory requirements as their commercial counterparts. See Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 291 (D.C. Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.2d 175 (1976). Thus the FCC, in its demand for unfettered license control over programming has made no distinction between private and public licensees. City of New York Municipal Broadcasting System, 56 F.C.C.2d 169 (1975).

The Public Broadcasting Act of 1967[20] enacted by Congress to provide financial assistance for programming and the operations of public broadcasters further illustrates a Congressional desire that public broadcast licenses retain independent programming responsibility. In enacting this statute Congress expressed the

[20]Public Broadcasting Act of Nov. 7, 1967, Pub. L. No. 90-129, 81 Stat. 365.

belief that the "local stations are the bedrock" and they rather than anyone else, are to "retain the responsibility to assess community needs and determine what programs will best meet those needs." S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967), U.S. Code Cong. & Admin. News 1967, p. 1772, 1778. Congress noted that "the decision to broadcast ...[any] program remains with the local station," id. at 15, U.S. Code Cong. & Admin. News 1967, p. 1786, and "each station would be required to make its own decision as to what program it accepts and broadcasts and at what time." Id. at 14-15,[21] U.S. Code Cong. & Admin. News 1967, p. 1786.

[5,6] The picture which emerges from the regulatory scheme adopted by Congress is one which clearly shows broadcast licensees endowed with the privilege and responsibility of exercising free programming con-

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[21] This insistence on unhindered local licensee programming discretion was codified in Section 396(g)(1)(B) of the Act.

trol of their broadcasts, yet also charged with the obligation of making programming decisions which protect the legitimate interests of the public. The right to the free exercise of programming discretion is, for private licensees, not only statutorily conferred but also constitutionally protected. CBS. Under the existing statutes public licensees such as AETC and the University of Houston possess the same rights and obligations to make free programming decisions as their private counterparts; however, as state instrumentalities, these public licensees are without the protection of the First Amendment. This lack of constitutional protection implies only that government could possibly impose restrictions on these licensees which it could not impose on private licensees. The lack of First Amendment protection does not result in the lessening of any of the statutory rights and duties held by the public licen-

sees. It also does not result in individual viewers gaining any greater right to influence the programming discretion of the public licensees.

V. KUHT-TV and AETC are not Public Forums

It is clear that Congress did not deem it necessary for viewers to be accorded a right of access to television broadcast stations in order for the public's First Amendment interests in this medium to be fully realized. Indeed it is clear that Congress concluded that the First Amendment rights of public television viewers are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest. In spite of this Congressional scheme the District Court in Barnstone found that KUHT-TV was a public forum because it was operated by the government for public communication of views

on issues of political and social significance. The court held that as a public forum the station could not deny access to speakers who wished to be heard in the forum, unless the requirements for prior restraint were satisfied. 514 F.Supp. at 689-91.

The plaintiffs now urge that we affirm the District Court's ruling that public television stations are public forums. The plaintiffs, unlike the District Court, however, do not argue for a public right of access to the stations. Instead the plaintiffs contend that as public forums the stations are prohibited by the First Amendment from making programming decisions motivated by hostility to the communicative impact of a program's message and stemming from a specific viewpoint of the broadcaster.

[7,8] We find both the holding of the District Court and the argument of the

plaintiffs to be incorrect. The Supreme Court has recently rejected the theory adopted by the District Court that because a government facility is "specifically used for the communication of information and ideas" it is ipso facto a public forum. United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 101 S.Ct. 2676, 2685 n. 6, 69 L.Ed.2d 517 (1981).[22] A facility is a public forum only if it is designed to provide a general public right of access to its use, or if such public access has historically existed and is not incompatible with the facility's primary activity.[23] In Southeastern

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[22]The Court in United States Postal Service ruled that mailboxes are not public forums.

[23] Cf. Greer v. Spock, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976): "The Court of Appeals was mistaken ... in thinking ...that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant 'that people who want to propangandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (quoting Adderly v. Florida, 385 U.S. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966).

Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972), we adopted the following test for determining whether a public facility is a "public forum:"

> does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance.

457 F.2d at 1019.

In the cases in which a public facility has been deemed a public forum the speakers have been found to have a right of access because they were attempting to use the facility in a manner fully consistent with the "pattern of usual activity" and

"the general invitation extended.[24] The pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority. The general invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered.[25]

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[24]The nature of facilities stitute public forums may be gleaned from municipal auditoriums, Southeastern Promo held to con- Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L the cases: (1975); bus terminals, Wolin v. Port of Ntions Ltd. v. ority, 392 F.2d 83 (2d Cir. 1968), cert. .Ed.2d 448 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (lew York Auth- airports, Chicago Area Military Project vdenied, 393 Chicago, 508 F.2d 921 (7th Cir. 1975), ce968); 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 4. City of high school auditoriums, National Socialirt. denied, People's Party v. Ringers, 473 F.2d 1010 83 (1975); 1973) (en banc); public libaries, Brown vst White 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 63(4th Cir. rality opinion); shopping centers, Amalga. Louisiana, Employees v. Logan Valley Plaza, 391 U.S.7(1966)(plu- S.Ct. 1601, 20 L.Ed.2d 603 (1968); and wemated Food ces, Albany Welfare Rights Organization v 308, 88 F.2d 1319 (2d Cir. 1974). lfare offi- . Wyman, 493

[25]Similarly producers of television programs are extended no invitation to air programs on the public television stations. Producers are, of course, free to submit their programs to the stations with a request that they be broadcast but they have no right to compel such broadcast. The decision whether to broadcast a program remains entirely with the licensee. The District Court for the Southren District of Texas thus in erred finding that the produc of "Death of a Princess" had the a right of access station KUHT-TV to broadcast the film.

It is thus clear that the public television stations involved in the cases before us are not public forums. The plaintiffs have no right to access to compel the broadcast of any particular program.

Our holding today is consistent with the Supreme Court's ruling in CBS that television stations operated by private broadcast licensees provide no public right of access. The Court in CBS pointed out that the creation of a public right of access to television stations would result in the derogation of the licensees' duty to insure that their stations serve the public interest:

> The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private indi-

viduals who are not. The public interest would no longer be "paramount" but, rather, subordinate to private whim.

CBS, 412 U.S. at 124, 93 S.Ct. at 2097. The court further observed that, aside from being inconsistent with the licensees' obligation to insure that the public interest is served, a public right of access is also inconsistent with the licensees' essential task of exercising editorial discretion:

> Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary.

Id.

The plaintiffs stress that they do not argue for the creation of a public right of

access to public television stations. They contend that, even without a public right of access, the stations are public forums and as such cannot make programming decisions based on the communicative impact of a program. We find this contention to be untenable. It is the right of public access which is the essential characteristic of a public forum and the basis which allows a speaker to challenge the state's regulation of the forum. The gravamen of a speaker's public forum complaint is the invalid and discriminatory denial of his right of access to the forum. If a speaker does not have a right of access to a facility, that facility by definition is not a "public forum" and the speaker is without grounds for challenge under the public forum doctrine.[26]

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[26] See Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); Lehman v. Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); Adderly v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

VI. The Decision to Cancel Death of a Princess was not Governmental Censorship

The plaintiffs argue that even if we decline to characterize KUHT-TV and AETC as public forums we should nonetheless find that the defendants violated the plaintiffs' First Amendment rights by "censoring" "Death of a Princess." The plaintiffs contend that the censorship, in violation of the First Amendment, occurs when state officials in charge of the state operated public television stations decide to cancel a scheduled program because of the official's opposition to the program's political content.

[9] There is no question that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content ... The essence of this forbidden censorship is content control." Police Dept. of Chicago v. Mosley, 408 U.S.

92, 95-96, 90 S.Ct. 2286, 2289-2290, 38 L. Ed.2d 212 (1972). However, the First Amendment prohibitions applicable to one method of expression do not always transfer intact to another method because "[e]ach method tends to present its own peculiar problems." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952). The Supreme Court has thus recognized that "because the broadcast media utilize a valuable and limited public resource" they "pose unique and special problems not present in the traditional free speech case." CBS, 412 U.S. at 101, 93 S.Ct. at 2085.

[10,11] We are not convinced that editorial decisions of public television stations owned and operated by the state must, or should, be viewed in the same manner and subjected to the same restrictions as state regulatory activity afecting speech in other areas. Standard First Amendment doc-

trine condemns content control by governmental bodies where the government sponsors and financially supports certain facilities through the use of which others are allowed to communicate and to exercise their own right of expression.[27] Government is

Government is allowed to impose restrictions only as to "time, place, or manner" in the use of such public access facilities --public forums.[28] As we observed ear-

lier, however, the First Amendment does not prohibit the government, itself, from speaking, nor require the government to speak.[29] Similarly, the First Amendment does not preclude the government from exercising editorial control over its own

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[27] See Bazaar v. Fortune, 476 F.2d 570, 574, aff'd as modified en banc, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974) (university literary magazine); Brooks v. Auburn University, 412 F.2d 117 (5th Cir. 1969) (speaker invited by college student organization).

[28] See L. Tribe 580-584.

[29] See p. 1050 infra; see also Houchins v. KQED, Inc., 438 U.S. 1, 13-14, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553 (1978).

medium of expression. See Wooley v. Maynard, 430 U.S. 705, 716-17, 97 S.Ct. 1428, 1436-37, 51 L.Ed.2d 752 (1977); Advocates for the Arts v. Thompson, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976); Avins v. Rutgers, State University of New Jersey, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920, 88 S.Ct. 855, 19 L.Ed.2d 982 (1968); Network Project v. Corporation for Public Broadcasting, 4 Med. L.Rptr. 2399, 2409 (D.D.C. 1979).

[12] The plaintiffs concede that state officials operating public televsion stations can exercise some editorial discretion. They contend, however, that in exercising this discretion the officials must be "carefully neutral as to which speakers or viewpoints are to prevail in the marketplace of ideas." CBS, Inc v. FCC, 629 F.2d 1, 30 (D.C. Cir. 1980), aff'd 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981). The

plaintiffs further contend that if the officials restrict a program due to their hostility to the political content of the program then the restriction is presumptively unconstitutional. The plaintiffs suggest that we adopt the evidentiary standard established by the Supreme Court in Mt. Healthy City School Dist. v. Doyle, 429 U.S. 0274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Under this standard the initial burden would be on the plaintiffs to show that unconstitutional motivations were a "substantial" or "motivating" factor in the defendants' decisions to cancel "Death of a Princess." Once this burden is met by the plaintiffs the duty shifts to the defendants to show that the decisions would have been the same if the improper factor had not been considered.

The plaintiffs' analysis fails to recognize a number of essential differences between typical state regulation of private

expressive activity and the exercise of editorial discretion by state officials responsible for the operation of public television stations. When state officials operate a public television station they must necessarily make discriminating choices. As the Supreme Court pointed out in CBS, 412 U.S. at 124, 93 S.Ct. at 2097 "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." In exercising their editorial discretion state officials will unavoidably make programming decisions which can be characterized as "politically motivated." All television broadcast licensees are required, under the public interest standard, to cover political events and to provide news and public affairs programs dealing with the political, social, economic and other issues which concern their community. See Representative Patsy Mink (WHAR), 59 F.C.C.2d 987 (1976); Fair-

ness Docrine and Public Interest Standards, 39 Fed. Reg. 26371 (July 18, 1974); Report and Statment of Policy re Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960). The licensees are thus required to make the inherently subjective determination that their programming decisions are responsive to the needs, problems and interests of the residents of the area they serve. Red Lion, 395 U.S. at 380, 89 S.Ct. at 1801. A general proscription against political programming decisions would clearly be contrary to the licensees' statutory obligations, and would render virtually every programming decision subject to judicial challenge.

The plaintiffs seek to draw a distinction between a decision not to show a program and a decision to cancel a previously scheduled program. They suggest that while it is a proper exercise of editorial discretion for a licensee initially to decide

not to schedule a program, it is constitutionally improper for the licensee to decide to cancel a scheduled program because of its political content. In support of their view the plaintiffs cited decisions holding that school officials may be free initially to decide which books to place in their school libraries but that a decision to remove any particular book may be subject to constitutional challenge.[30] We

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[30] At the same time this case was submitted to us, the plaintiff cited, inter alia, Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980), and we noted that the Supreme Court had granted certiorari. On June 15, 1982, the judgment of the Supreme Court was handed down, Board of Educ v. Pico,---U.S.---, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). We are unable to interpret the Court's opinion in Pico to give us guidance in the application of the First Amendment to the case at hand. First, Pico is a case involving a constitutional attack upon the removal of books from a school libarary which, as discussed in the text, is quite different from the situation confronting us. Further, we conclude that the Supreme Court decided neither the extent nor, indeed, the existence vel non., of First Amendment implications in a school book removal case.

A majority of the justices did not join any single opinion in Pico. There is a plurality opinion, i.e., one attracted more concurrences than did any other opinion leading to the result. The opinion by Justice Brennan is joined by Justice Marshall and Justice Stevens. Justice Blackmun concurred in all save one section, but dissents from the plurality's opinion that the "right to receive information" detected by Justice Blackmun imposes a duty upon the State to provide information or ideas,--U.S. at ---, 102 S.Ct. at 2814, and is dubitante as to the plurality's opinion that there is a difference between the removal of a book from a school library and the failure to acquire a book. Id. n.1.

are not persuaded, however, that the distinction urged upon us is valid or that the school library cases are applicable.

The decision to cancel a scheduled program is no less editorial in nature than an initial decision to schedule the program. See Advocates for Arts v. Thomson, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976). Both decisions require the licen-

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The Chief Justice and three others, Justice Powell, Justice Rehnquist and Justice O'Connor, in dissent, agree with Justice Blackmun that there is no First Amendment obligation upon the State to provide continuing access to particular books, ---U.S. at ---, 102 S.Ct. at 2819 (Burger, C.J., dissenting), thus making a majority of Members for that view. The four in dissent find no difference, in constitutional law, in the removal of a book and in the failure to acquire it. Id. ---U.S. at ---, 102 S.Ct. at 2821. Three Members detect such a difference; four reject the notion; and one Member doubts its existence.

The Fifth Member of the Court voting for the judgment expresses no opinion on the First Amendment issues, being of the opinion that the Court should not, until after remand, "issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library." Id. ---U.S. at ---, 102 S.Ct. at 2816 (White, J., concurring in the judgment). Justice White does not express the view that there may be facts implicating the First Amendment but, detecting that there may be a factual setting which would not involve constitutional concerns on the part of any Member, prefers a more complete record development before addressing such concerns.

Being instructed by Marks v. United States, 430 U.S. 188, 192-93, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), and Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49

see to determine what will best serve the public interest, and, as we noted earlier, such a determination is inherently subjective and involves judgments which could be termed "political.""

School libraries are distinguishable from broadcast stations in a number of important way. There are limited hours in a day for broadcasting, and broadcast licensees are constantly required to make sensitive choices between available programs. Cf. Board of Education v. Pico, --U.S.--, ---, n. 1, 102 S.Ct. 2799, 2814, n.1, 73

L.Ed.2d 859 (1976)(plurality opinion), that in no-clear-majority cases we should look to "that position taken by those members who concurred in the judgment on the narrowest grounds," id. at 169 n.15, 96 S.Ct. at 2923 n.15, and finding in the opinion of Justice White the narrowest grounds for the judgment, we conclude that Pico is of no precedential value as to the application of the First Amendment to these issues. (For commentary discussing the task of determining precedent from plurality opinions, see, e.g., Note, Plurality Decisions and Judical Decisionmaking, 94 Harv. L. Rev. 1127(1981); Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Colum.L. Rev. 756 (1980).

While the majority of the Court entered judgment in Pico resulting in a remand for the development of the record this was necessarily based upon the status of the record and the issues presented in the case. Here, we are satisfied that the record before us adequately presents the issues.

L.Ed.2d 435 (1982) ("The school's finite resources--as well as the limited number of hours in the day--require that educational officials make sensitive choices between subjects to be offered ...") (Blackmun, J., concurring in part). The maintenance of one volume on a library shelf does not (absent space limitations) preempt another. In broadcast, only one transmission of information, entertainment, or other message can occur at any one time. A library constantly and simultaneously proffers a myriad of written materials. As discussed in Part IV, hereinabove, the Congress has undertaken its careful analysis and balancing of conflicting interests involved in broadcasting and in public broadcasting, and the judicial branch should pay careful attention.[31] CBS, 412 U.S. at 103, 93 S.Ct.

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[31] All branches of government are, and ought to be, guardians of the Constitution. It is no encroachment upon the private preserve of the Judicial Branch for the Congress to undertake implementation of the First Amendment; it is the duty of the Congress to do so. The Judiciary must be the final arbiter, but it is not the sole provider of freedom under the Bill of Rights.
The courts properly pay close attenton to the implementation of constitutional guarantees by the Congress. CBS, 412 U.S. at 103, 93 S.Ct. at 2086. Indeed, the Supreme Court has not infrequently

at 2086. There have been no comparable deliberations or enactments by that branch with respect to libraries. More specifically, there is no counterpart, vis-a-vis libraries, to the Federal Communications Commission's "Fairness Doctrine."[32] When a television boradcaster finds that it uled a program espousing one view, it may have unwittingly encumbered its limited broadcast hours with a requirement that

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deplored the absence of action by the Congress, which, by its nature, is equipped to gather information and consider the impact and effectiveness of proposals to implement such guarantees far more broadly than the considerations advanced in a given case. See e.g., Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 421, 91 S.Ct. 1999, 2017, 29 L.Ed.2d 619 (Burger, C.J., dissenting)(absence of Congressional action to implement Fourth Amendment deplored); Stone v. Powell, 428 U.S. 465, 500, 96 S.Ct. 3037, 3055, 49 L.Ed.2d 1067 (Burger, C.J., concurring)(desirability of Congressional implementation of Fourth Amendment again noted).

[32] "Formulated under the Commission's power to issue regulations consistent with the 'public interest,' the [Fairness Doctrine] imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable and must initiate programming on public issues if no one else seeks to do so."
CBS, 412 U.S. at 110-11, 93 S.Ct. at 2090-91 (citations omitted).

equal time be devoted to other viewpoints which might touch upon an issue of limited interest in its viewing area. But the maintenance of one volume espousing one side of an issue does not invoke government regulation requiring that shelf space be made available for all other views. Finally, a school would be expected to furnish only one library for its student population. The residents of a state may expect a choice of a number of television stations, often with the publicly owned facility attracting the smallest number of viewers.

The right to cancel a program is, furthermore, far more integral a part of the operation of a television station than the decision to remove a book from a school library. Libraries typically have at least the opportunity to review a book before acquiring it, therefore, there may be "few legitimate reasons why a book, once acquired, should be removed from a library not

filled to capacity." Pico v. Board of Education, 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring), aff'd, --U.S.--, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). In comparison, television stations frequently do not have the chance to see a program until after the station's schedule has been printed, and there are numerous legitimate reasons why a station may decide to cancel a program it has initially scheduled. Indeed FCC regulations specifically require that licensees retain the power to reject any program which the licensee has already contracted for if the licensee determines that the program is "unsatisfactory or unsutable or contrary to the public interest." 47 C.F.R § 73.658.

We conclude that the defendants' editorial decisions to cancel "Death of a Princess" cannot be properly characterized as "censorship." Had the states of Alabama and Texas sought to prohibit the exhibition

of the film by another party then indeed a question of censorship would have arisen. Such is not the case before us. The states have not sought to forbid or curtail the right of any person to show or view the film. In fact plaintiff Barnstone has already viewed the film at an exhibition at Rice University in Houston.[33] The state officials in charge of AETC and KUHT-TV have simply exercised their statutorily mandated discretion and decided not to show a particular program at a particular time. There is a clear distinction between a state's exercise of editorial discretion over its own expression, and a state's prohibition or suppression of the speech of

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[33]Thus, contrary to the findings of the District Court in Barnstone, the defendant did not suppress the speech of the producer of "Death of a Princess." The defendants did not in any manner seek to prevent the producers from freely distributing or exhibiting the film. The defendants chose only not to exhibit the film through the stations which they were licensed to operate.

another.[34]

VII. The Plaintiffs Can Seek Remedial Relief from the FCC

Our holding that the defendants did not violate the plaintiffs' First Amendment rights does not preclude the plaintiffs from challenging the propriety of the defendants' programming decisions with the FCC. Our decision is limited to the constituitional issue presented. We offer no opinion as to whether or not the actions of AETC and the University of Houston comport with their statutory and reglatory obligation.

[13] Under the Communications Act the

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[34]The state may not suppress the expression of ideas. Thus, the state may not prevent Nazi's from expressing their views in a parade National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam). There is a right to receive ideas that others express. Therefore, we apprehend that the state could not forbid or unreasonably obstruct people within its jurisdiction from viewing the Nazi parade. Lamont v. Postmaster general, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965). Nevertheless, the State is free to decline to express itself in such a parade and we apprehend that, should a misguided police chief schedule the appearance of the police force at the head of a Nazi parade, wearing swastika arm bands, there would be no censorshiop, interference with the right to recieve, or other First Amendment violation should the Mayor or City Council cancel the scheduled appearance of the police officers.

FCC may at any time, upon public complaint or sua sponte, review the programming selections of its licensees to ascertain whether they are complying with the requirements of the Act, in particular the requirement that the licensee act in the public interest. 47 U.S.C. § 308(b), The FCC routinely reviews complaints similar to those raised by the plaintiffs.[35] If

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[35] See e.g., KAMP, Inc. 72 FCC.2d 241 (1979)(suppression of news concerning United Farm Workers Movement); Right to Life of Louisville, Inc., F.C.C.2d 1103 (1976) (refusal to broadcast photographs of live fetuses in womb); RKO General, Inc., 46 F.C.C. 2d 240 (1974) (failure to air program about Passover); Representative Patsy Mink (WHAR), 59 F.C.C.2d 987 (1976) (failure to broadcast strip mining program); William Harsha, 31 FCC.2d 847 (1971) (refusal to allow George Jessel's criticism of "The New York Times" and "The Washington Post"); Mrs. Alexandra Mark, 34 F.C.C.2d 434 (1974), aff'd Mark v. FCC, 468 F.2d 266 (1st Cir. 1972) (refusal to allow comments concerning astrology and astrological sign reading); Citizens Communications Center, 25 F.C.C.2d 705 (1970) (refusal to air intimate scene between Black and White actors); Letter to Richard L. Ottinger, 31 F.C.C.2d 852 (1970) (editing of remarks on Chicago conspiracy trial); Gross Telecasting, Inc. 14 F.C.C.2d 239 (1968) (news slanting for private interests of licensee); Tri-State Broadcasting Co., Inc., 59 F.C.C.2d 1240 (1976)(alleged news distortion to promote interests of advertisers); Public Communications, Inc., 49 F.C.C.2d 83 (1974) (deletion of references to product in entertainer's monologue); Screen Gems Stations, Inc., 46 F.C.C.2d 252 (1974), recon. denied, 51 F.C.C.2d 557 (1975) (broadcast of Sugar Bowel would be contrary to public interest because the game discriminates against Blacks); Columbia Broadcasting System (Mobile Homes), 43 F.C.C.2d 1266 (1973) ("60 Minutes" segment on mobile homes failed to disclose CBS's interest in a Florida development); Mark Lane, 37 F.C.C.2d 630 (1972) (detection of remarks in discussion of Viet Nam

the FCC determines that a licensee has engaged in improper programming it can impose a variety of remedial sanctions including: adminishment of the license for irresponsible programminmg judgments, Columbia Broadcasting System (WBBM-TV), imposition of a forfeiture for programming inconsistent with a public interest, Illinois Citizens Committee for Broadcasting v. F.C.C.,515 F.2d 397 (D.C. Cir. 1974); declaration that the licensee has failed to comply with FCC policies, Representative Patsy Mink, issuance of a "short term" re-

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War); National Broadcasting Company (Chet Huntley), 14 F.C.C.2d 713 (1968) (Chet Huntley commentary re: Wholesom Meat Act of 1967 failed to disclose his ranching interests); KTYM (Anti-Defamation League), 4 F.C.C.2d 190 (1966), aff'd 403 F.2d 169 (D.C. Cir. 1968), cert. denied, 394 U.S. 930, 89 S.Ct. 1190, 22 L.Ed.2d 459 (1969) (broadcast of allegedly anti-Semitic remarks); Bernard Hanft, 14 F.C.C.2d 364 (1968) (failure to cover department store picketing); Columbia Broadcasting System WBBM-TV), 18 F.C.C.2d 124 (1969) (allegation that "pot party" documentary was staged by broadcaster); Columbia Broadcasting System (Poor People's Campaign), 17 P & F Rad. Reg.2d 843 (1969) (coverage of Poor People's Campaign allegedly slanted and staged); RadioStation WSNT, Inc., 27 F.C.C.2d 993 (1971) (failure to cover black organization's activities); Time-Life Broadcasting, Inc. (KOGO-TV, 33 F.C.C.2d 1030 (1972) (allegations of "Anglo bias" in the news): Hunger in America, 20 F.C.C.2d 143 (1969) (documentary allegedly misleading and staged): Lincoln County Broadcasters, Inc., 51

broadcast of the program. Accordingly, we find that the District Court for the Northern District of Alabama properly awarded summary judgment to AETC. We also find that the District Court for the Southern District of Texas erred in issuing its order requiring KUHT-TV to broadcast the program.

The judgment of the District Court for the Northern District of Alabama is AFFIRMED.

The judgment of the District Court for the Southern District of Texas is REVERSED and REMANDED. On remand the District Court shall dissolve the injunctive relief and render judgment for appellants.

RUBIN, Circuit Judge, with whom POLLITZ, RANDAL and WILIAMS, Circuit Judges joined, specially concurring.

While I join in the result reached by the majority, I reached my conclusion on a different basis. Therefore, I join in the views expressed by Judge Garwood and add:

The sensitive and important issues in

newal, CBS, Inc., 69 F.C.C.2d 1082 (1978); designation of license renewal application for full evidentiary hearing, WTTW, Inc., 52 F.C.C.2d 683 (1977); and denial of license renewal.[36]

bia Broadcasting System (WBBM-TV), imposition of a forfeiture for programming inconsistent with a public interest, Illinois Citizens Committee for Broadcasting v. F.C.C.,515 F.2d 397 (D.C. Cir. 1974); declaration that the licensee has failed to comply with FCC policies, Representative Patsy Mink, issuance of a "short term" re-

VII. Conclusion

The decision of AETC and the University of Houston to cancel "Death of a Princess" did not violate the First Amendment rights of the plaintiffs. The plaintiffs have no constitutional right to compel the

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F.C.C.2d 65 (1975) (broadcast critical of zoning decision for political reasons).

[36] Indeed in Alabama Educational Television Commission, 50 F.C.C.2d 461 (1975) the FCC denied AETC's license renewal application because of its finding that AETC's programming discriminated against Blacks.

these cases cannot be resolved simply by attempting to decide whether a television station operated by a state injury is, or is not, a public forum. That term is but a label, developed to describe a location the use of which is open to the public. It does ot express a definitiion but a conclusion.[1] The limitations imposed by the First Amendment on the operatoin of a medium of communication cannot be determined by application of the rules governing freedom of expression in streets and other areas that by tradition or design serve as platforms for expression subject only to reasonable time, place, and manner restrictions and free from content control.

The issue directly presented can be stated simply: wheter an individual viewer has a right to compel a television station operated by a state agency to broadcast a single program previously scheduled by an employee of the agency that a higher-

[1] See Karst, Public Enterprise and the Public Forum: A Comment on Southeastern Promotions Ltd. v. Conrad, 37 Ohio St. L.J. 247, 254 (1976)

ranking state official has decided, because of its content, to cancel. This pretermits the factual questions whether the program was cancelled for what the dissent calls "legitimate reasons" and whether the official's objection to the content of the program and to its political implications was in either of these cases the sole reason for canceling "Death of a Princess" or merely the decisive one. Although these are not unimportant inquiries, they do not focus on the crucial issue: how does the First Amendment control state action when the state is operating a television station?

Determination of the constitutional limitations that result because a television licensee is a state agency rather than a private agency must take into accouint not only the rights of viewers but a number of other considerations. The license is federally bestowed. The state agency licensee has both a statutory duty to comply with the rules and regulations governing

the use of its license[2] and like other licensees,[3] the statutory right to determine the way in which it shall fulfill that duty.[4] Those state employees who are charged with operation of the station, whether high or low in the managerial hierarchy, may have some right to free expression, which may be stronger if, for example, they function in an academic environment devoted to freedom of inquiry.[5]

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[2] 47 U.S.C. § 303; see Red Lion Broadcasding Co. v. FCC, 395 U.S. 367, 379-80 S.Ct. 1794, 1800-01, 23 L.Ed.2d 371, 382-83 (1969).

[3] See Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 291 (D.C.Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1664, 48 L.Ed.d 175 (1976).

[4] See Columbia Broadcasting Sys, Inc. v. Democratic Nat'l Comm., 412 U.S. 94,109-10, 93 S.Ct. 2080, 2089-90, 36 L.Ed.2d 772, 787-88 (1973), 47 U.S. C. § 326; Note, Broadcast Deregulation and the First Amendment: Restraints on Private Control of the Publicly Owned Forum, 55 N.Y.U.L.Rev. 317, 18, 521 (1980).

[5] See Bazaar v. Fortune, 476 F.2d 570, 580 (5th Cir.) ("[w]e must take note of the historical role of the Uniersity in expressing opinions which may well not make favor with the majority of society and in serving the vanguard in the fight for freedom of expression and opinioni"), aff'd as modified en banc, 489 F.2d 225 (5th Cir. 1973) (per curiam), cert. denied, 416 U.S. 995 S.Ct. 2409, 40 L.Ed.2d 774 (1974) Brooks v. Auburn Univ., 412 F.2d 1171, 1173 (5th Cir. 1969) ("A school may not stifle dissent because the subject matter is out of favor. Free expression is itself a vital part of the educational process.'")(quoting Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 704 (5th Cir. 1968) (Godbold, J., concurring).

Those who want access to the medium in order not to view and listen but to disseminate a message must also be considered. Viewers also have an interest in the content of program, not only because of their "right to see" bukt also becaue the state agency is financed at least in part by viewers as taxpayers.

These interests are all entitled to consideration and some or all of them may be accorded constitutional protection. Whether a viewer has a right, therefore, to see a single program that has been cancelled by station management cannot be determined by focusing only on the interests of the viewer.[6] The interests of other persons and the functoin the state is discharging must also be considered, for the duties imposed on the state in connection

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[6] See generally Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03, 94 S.Ct. 2714, 1717, 41 L.Ed.2d 770, 777 (1974) (plurality opinion); Although American constitional jurisprudence, in the ight of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question

with its various activities depend in part on the functions served by those activities.

Even the fact that the state is engaged in television broadcasting does not fully define the constitutionallimitations on its actions, for such broadcasting might be designed to serve differing purposes. Licensing is not destiny. That the state is the licensee does not predetermine the station's function. The state may elect the station's mission, so long as this mission is consistent with the station's license and the Constitution. The prerogatives of managers, editors, and programmers, the rights of accss of those who seek exposure, and the rights of viewers, as well as the prerogatives of the license itself as a state agency, are at least in large part determined by this mission.

All, or in other instances a part, of a station's programs might be devoted to providing a medium for the communication of

competing views.[7] Some channels on cable television networks and some viewer or listener call-in programs on television and radio stations are of this kind. Some television stations are devoted entirely to educational purposes, designed solely for pedagogy. Others may be operated to furnish a varied menu of entertainment, having greater cultural and educational value than the programs available on commercial stations. While the record is not clear, it appears that the two stations involved in these cases were of this sort. Neither station has been shown to have been a magazine of the air, a forum for all views, or a dispassionate communicator on issues of the day. Each appears to serve instead a diet that difers from commercial television primarily in appeal to a somewhat more sophisticated audience, the absence of commercials, and efforts to raise funds from

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[7] Cf. City of Madison JointSchool Dist. v. Wisocnsin Emp. Comm'n., 429 U.S. 167,175, 97 S.Ct. 421, 426, 50 L.Ed.2d 376, 384 (1976) ("State has opened a forum for direct citizen involvement").

viewers.

The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions. State agencies publish alumni bulletins, newsletters devoted to better farming practices, and law reviews; they operate or subsidize art museums and theater companies and student newspapers. The federal government operates the Voice of America[8] and Radio Free Europe and Radio Liberty,[9] publishes "journals, magazines, periodicals, and similar publications" that are "necessary in the transaction of the public business,"[10] including newspapers for branches of the Armed Forces, and pays the salaries of many federal officials who, like the President's Press Secretary, communicate with the public through the media. The First Amendment

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[8] 22 U.S.C. § 1463 (1976 & Supp. IV 1980).

[9] Id. §§ 2871-2879.

[10] 44 U.S.C. § 1108.

does not dictate that what will be said or performed or published or broadcast in these activities will be entirely content-neutral. In those activities that, like television broadcasting to the general public, depend in part on audience interst, appraisal of audience interest and suitability for publication or broadcast inevitably involves judgment of content.[11]

If the state is conducting an activity that functions as a marketplace of ideas, the Constitution requires content neutrality. Thus, a state university may not override editorial freedom from student newspapers.[12] If, however, the state's activity is devoted to a specific function rather than general news dissemination or

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[11] A recent article on one of these activities, Voice of America, vividly illustrates this point. Bethell, Propaganda Warts, Harper's May 1982, at 19. Indeed this article describes an incident similar to the ones at issue in these cases. Id. at 21.

[12] See Bazaar v. Fortune, 476 F.2d at 573075, Dickey v. Alabama State Bd. of Educ., 273 F.Supp 613, 617-18(M.D. Ala. 1967), vacated as moot sub nom Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968)

free exposition of ideas, the state may regulate content in order to prevent hampering the primary function of the activity,[13] just as it may to some degree restrict the content of material distributed or displayed on military establishments,[14] in prisons,[15] on public buses,[16] or in public hospitals.[17]

All of the opinions in Board of Educ. v. Pico, -- U.S. --, 102 S.Ct. 2799, 73 L. Ed.2d 435(1982), recognize such a distinc-

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[13] See Adderly v. Florida,385 U.S. 39, 47, 87 S.Ct. 242, 247, 17 L.Ed.2d 149, 156 (1977) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.")

[14] Greer v. Spock, 424 U.S. 828, 836-40, 96 S.Ct. 1211, 1216-18, 47 L.Ed.2d 505, 515-15 (1976); id. at 843, 96 S.Ct. at 1220, 47 L.Ed.2d at 517-18 (Powell, J., concurring).

[15] See Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119, 134-35, 97 S.Ct. 2352, 2542-43, 53 L.Ed.2d 629, 644-45 (1977).

[16] Lehman v. City of Shaker Heights, 418 U.S. at 302-04, 94 S.Ct. at 2717-18, 41 L.Ed.2d at 776-78.

[17] Dallas Ass'n of Community Orgs. for Reform Now v. Dallas County Hosp. Dist., 670 F.2d 629, 631-32 & n.2 (5th Cir. 1982) (per curiam).

tion either implicitly or expressly.[18] Justice Brennan's opinion for the plurality stresses "the limited nature of the substantive question," presented by the challenge to a school board's removal of books from a school library.[19] It does not classify the library as a public forum and emphasizes that the challenged action "does not involve the acquisition of books."[20] It postulates that "all First Amendment rights accorded to students must be con-

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[18] Seven Justices filed opinions in Pico. The Court divided four-four on the constitutional issue of the extent to which the first amendment limits the discretion of a school board to remove books from a school library. Justice White concurred in the judgment of the Court but did not reach this issue. See generally Maj.Op. supra, 688 F.2d at 1045, 1052, n.30.

[19] L.Ed.2d at 443; see id. at ---, 102 S.Ct. at 2806, 73 L.Ed.2d at 444;

> In sum, the issue before us in this case is a narrow one, both substantively and procedurally. It may best be restated as two distinct questions. First, does the First Amendment impose any limitations upon the discretion of petitioners to remove library books from the Island Trees High School and Junior High School? Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact wheter petitioners might have exceeded those limitations? (Emphasis in original).

truded in light of the special characterics of the school environment,'"[21] just as, I submit, the rights of television viewers must be construed in the light of the special characteristics of the television media and the mission of particular state-operated television stations. The plurality opinion turns on "the unique role of the school library"[22] as discussed, in particular, from the determination of school curriculum.[23]. Because the plurality was addressing only the suppression

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[20] Id. at ---, 102 S.Ct. at 2805, 73, L.Ed.2d. at 444, (Emphasis in original).

[21] Id. at ---, 102 S.Ct. at 2805, 2808-09, 73 L.Ed.2d at 447, (Quoting Tinker v. Des Monies School.

[22] Id. at ---, 102 S.Ct at 2809, 73 L.Ed.2d. at 448.

A school libarary...is "a place dedicatedtion-to quiet, to knowledge, and to beauty." Brown v. Louisiana, 383 U.S. 131, 142, [86 S. Ct. 719, 724 15L.Ed.2d 637] (1966) (opinions of Fortas, J.) Keyishian v. Board of Regents, 385 U.S. 589[,603, 87 S.Ct. 675, 684, 17 L.Ed.2d. 629] (1967), observed that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." The school library is the principle focus of such freedom. 102

Id. at ---, 102 S.Ct. at 2809, 73 L.Ed.2d at 448 (footnote omitted).

"it could write without considering "the discretion of a local school board to choose books to add to the libraries of their schools."[24]

In his concurring opinion, Justice Blackmun is willing to say only that "certain forms of state discrimination between ideas are improper."[25] He "doubt[s] that there is a theoretical distinction between removal of a book and failure to acquire a book."[26] Therefore, he is willing to say only that "school officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials'

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[23] ---U.S. at ---, 102 S.Ct. at 2809, 73 L.Ed.2d at 448.

[24] Id. at ---, 102 S.Ct. at 2810, 73 L.Ed.2d at 450

[25] Id. at ---, 102 S.Ct at 2814, 73 L.Ed.2d at 454 (concurring in part and concurring in the judgment) (emphasis in original).

[26] Id. at --- n.1, 102 S.Ct. at 2814 n.1, 73 L.Ed.2d at 454 n.1.

dis approval of the ideals involved."[27] He also noted that the nature of the governmental activity at issue is significant in detrmining to what extent the first amendment limits government officials' discretion to regulate speech.[28]

The dissenters do not agree that students have a constitutional right to receive information or that "a school board [has a duty to] affirmatively aid [a] speaker in its communication with the recipient."[29] "[T]he 'right' to receive information and ideas' ... does not carry with it the concomitant right to have those ideas affirmatively provided at a particular place by the government."[30] In his

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[28] See id. at --- 102 S.Ct. at 2814, 73 L.Ed.2d at 454:

> [T]he unique environment of the school places substantial limits on the extent to which official decisions may be restrained by the First Amendment values. But that enviornment also makes it particularly important that some limits be imposed.ng in part and concurring in (Emphasis in original).

[29] Id. at ---, 102 S.Ct. at 2818, 73 L.Ed.2d at 460 (Burger, C.J. dissenting).

[30] Id. at ---, 102 S.Ct. at 2819, 73 L.Ed.2d at 460 (quoting Stnaley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d. 542, 549 (1969)).

dissenting opinion, Justice Powell adds: "[T]his new found right [to receive ideas] find no support in the First Amendment precedents of this Court."[31]

All of the opinions in Pico, therefore, seem to support the distinction between the application of the first amendment to limitations on the use of a public forum and the restrictions it may impose on governmental action in conducting a particular activity. Whether the views of the pleurality or those of the dissenters express the constituional interpretation that will ultimately be adopted, Pico seems to endorse the view that the nature of the activity determines the stric-

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[31] Id at ---, 102 S.Ct. at 2822, 73 L.Ed.2d at 465; accord, id. at ---, 102 S. Ct. at 2830, 73 L.Ed.2d at 474 (Rehnquist, J. , dissenting) ("The right decribed by [Justice Brennan's plurality opinion] has never been recognized in the decisions of this Court and is not supported by their rationale."); see id at ---, 102 S.Ct. at 2835, 73 L.Ed.2d at 481 (O'Connor, J., dissenting).

[32] See Board of Educ. v. Pico --- U.S. at ---, 102 S.Ct. at 2810, 73 L.Ed.2d at 449 (plurality opinion); id. at ---, 102 S.Ct. at 2813, 73 L.Ed.2d. at 453 (Blackmun, J., concurring in part and concurring in the judgment); id at ---, 102 S.Ct. at 2827, 73 L.Ed.2d at 470 (Rehniquist, J., dissenting).

tures the first amendment places on governmental action.

While the Mobile and Houston television stations are operated by state agencies, neither station is designed to function as a marketplace of ideas, a medium open to all who have a message, whatever its nature. The staff of each station had made an initial programming decision based in part on their assessment of the content of "Death of a Princess." Had the initial decision been not to use the program, the argument might have been made that this too was censorship and violated the potential viewers' right to see. If a decision is initially made at one level to use a program and is then reversed at a higher level, the content assessment involved is more apparent, but it is not necessarily converted thereby from legitmate programming into forbidden censorhip.

Judicial reassessment of the propriety of a programming decision made in operating a television station involves not only in-

terference with station management but also reevaluation of all of the content-quality-audience reaction factors that enter into a decision to use or not to use a program by a medium that cannot possibly, by its very nature accommodate everything that every viewer might desire. With deference to the dicta observations made in the Pico plurality opinion, our reexamination of such a decision cannot logically be confined to occasions when higher officials overrule subordinates. If it is forbidden censorship for the higher official to cancel a program, it is euqally censorhip for the lower officials to decide initially to reject a program.

The Constitution is categoric but it does not command the theoretical. The state's discretion is confined by the functions it may perform as a broadcast licensee, and the purpose to which it has dedicated its license. Moreover, these cases involve only one program, not a licensee

and the purpose to which it has dedicated its license. Moreover, these cases involve only one program, not a licensee policy or y practice of, for example, favoring only one political party, or of broadcasting raciall or religiously discriminatory views.[32] Neither complaint even alleges that either station has a policy of curtailing access to ideas. Each seeks only to compel the defendant station to show a single program. Judicial intervention might be required if these or other licensees should adopt or follow policies or practices that transgress constitutional rights. But, one call, even if it is ill-advised, does not constitute a policy or practice, and judicial intervention does not appear required or warranted for a single programming decision.

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[32] See Board of Educ. v. Pico, --- U.S. at ---, 102 S.Ct. at 2810, 73 L.Ed.2d at 449 P (plurality opinion); id. at ---, 102 S.Ct. at 2813, 73 L.Ed.2d at 453 (Blackmun, J., concurring in part and concurring in the judgment); id. at ---, 102 S.Ct. at 2827, 73 L.Ed.2d at 470 (Rehnquist, J. Dissenting).

For these reasons, although I cannot agree with all of the majority opinion, particularly its discussion of the application of the public forum doctrine, I concur in the result.

KRAVITCH, Circuit Judge, dissenting:

I agree with the analysis in Judge Johnson's thorough and well-reasoned dissent, with one exception: his statement that the government's decision to withdraw a program becomes presumptively unconstitutional once a plaintiff has shown that the decision was made because of the program's "substantive content." In my view, in addition to "substantive content," there must be shown an improper motivation, an intent to "restrict[] access to the political ideas or social perspectives discussed...." Board of Education v. Pico, --- U.S. ---, ---, 102 S.Ct. 2799, 2814, 73 L.Ed.2d 435 (1982) (Blackmun, J., concurring). In this regard I agree with Judge Reavley. I do not join Judge Reavley's dissent, however,

because his standard suggests that intent to suppress must be the sole factor before the withdrawal violates the First Amendment. The Pico plurality explicitly stated that an improper motive is a "decisive factor" and makes the withdrawal unconstitutional if it is a "substantial factor." Id. at --- & n. 22, 102 S.Ct. at 2809 & n. 22 (plurality opinion of Brennan, J. Marshall, J., and Stevens, J.) The improper motivation need not be the only factor in the withdrawal decision. For these reasons I write separately.

FRANK M. JOHNSON, Jr., Circuit Judge, with whom HATCHETT, ANDERSON, TATE AND THOMAS A. CLARK, Circuit Judges, join, dissenting.

I dissent because I am convinced that the majority has committed a serious error in applying the law to these cases. The clearly defined issue in these appeals is whether the executive officers of a state operated public television station may

cancel a previously scheduled program because it represents a point of view disagreeable to the religious and political regime of a foreign country. The majority opinion permitting cancellation on these grounds flies completely in the face of the First Amendment and our tradition of vigilance against governmental censorship of political and religious expression.

Death of a Princess is a dramatization of one man's investigation of the circumstances and motives which led to the July 1977 execution of a Saudi Arabian princess and her lover for adultery. The film presents narrative and recreated interviews which examine the religious, cultural, and political hierarchy of Saudi Arabian society. Death of a Princess is directly critical of many aspects of the Saudi Arabian society. Death of a Princess

is directly critical of many aspects of the Saudi regime, including the government's enforcement of religious and cultural proscriptions.

The Saudi government reacted strongly to the production and distribution of Death of a Princess. After the film was shown in Great Britian, Saudi Arabia temporarily recalled its ambassador in protest. The Saudis again evidenced strong displeasure when PBS scheduled the film for broadcast in May 1980 as part of its World series.

The record in Muir reveals that during the period immediately preceding the May 12 air date the Alabama Educational Television Commission received numerous telephone calls expressing concern over the scheduled telecast of Death of a Princess.[1] William

[1]The district court in Muirentered its orders denying the preliminary injunction and granting defendants' motion for summary judgment in this case without befit of oral evidence and on the basis of very limited discovery. Assuming that

Harbert of Harbert Construction Company, an Alabama firm with substantial Saudi and Middle Eastern busines, along with a representative of the Birmingham Area Chamber of Commerce, personally contacted Henry Bonner, program manager of the Alabama Educational television Commission to express their concern regarding the proposed broadcast. On May 9th Bonner reported these conversations and the fact of the telephone calls to Edward Wegener, general manager of the Alabama Educational Television Commission, who in turn contacted Jacob Walker, Chairman of the Alabama Educational Tele-

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the court did not abuse its discretion in denying the preliminary injuction, the issue of summary judgment remains. In reviewing the appropriateness of summary judgment this Court must view the facts in the light most favorable to the nonmoving party to determine (i) whether there is a genuine issue as to any material fact, and (ii) whether the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c); Northeast Ga. Radiological Associates, P.C. v. Tidwell, 670 F.2d 507, 510 (5th Cir. 1982); Joplin v. Bias, 631 F.2d 1235, 1237 (5th Cir. 1980).

vision Commission..

Walker scheduled a telephone conference with the other commissioners for later in the day. At some point, Walker spoke directly with Harbert, who supplied him with most or all of the facts relied on by the commission in reaching its conclusion that "broadcast of the program could expose Alabama citizens in the Middle East to physical and emotional abukse through rioting, physical assault and property damage." The plaintiffs unsuccessfully maintained that the decision "was one made out of political considerations." (R at 96.)

The district couirt in Barnstone found that Dr. Patrick Nicholson, Vice President for Public Information and University Relations of the University of Houston, unilaterally decided to prevent broadcast of "Death of a Princess on the University operated television station, KUHT-TV. Barnstone v. University of Houston, 514 F.

Supp. 670 (S.D. Tex 1980). Nicholson, who had never made a programming decision in his 17 years' tenure and who was opposed in his decision to cancel the scheduled program by the station's programming director and eventually by the general manager of KUHT-TV, cited as his reason the "strong and understandable objecions by the government of Saudi Arabia." Id. at 674. While Dr. Nicholson testified that he feared the broadcast might 'exacerbate the situation in the Middle East," the court found that he was "entirely unable ... to explain what he meant by this phrase ... " Id. at 691.

The majority of this Court--now in the twilight of its long and honorable existence[2]--has affirmed Muir and reversed

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[2]By Public Law 96-452, 94 Stat. 1994, effective October 1, 1981, the United States Congress divided the Fifth circuir Court of Appeals into two new autonomous circuits--the new Fifth Circuit and the Eleventh Circuit. The cases now under consideration, as required by the Act, are being considered by the judges of the former Fifth circuit as if the legislation dividing the circuit "had not been enacted." Pub. Law 96-452 § 9(3). Thus, having been established by Congress in 1891 as one of the original Circuit Courts of Appeals, the Fifth Circuit is indeed in its twilight.

Barnstone in an opinion which grants state authorities unlimited discretion to regulate tkhe content of public television within their control. Because state law and FCC licensing grant defendants full broadcasting authority over these stations in their respective areas, the majority's decision confers unrestricted control over a monopoly market. See Ala. Code §§ 16-7-5; Barnstone v. University of Houston, supra, 514 F.Supp. at 672-73, 680. By finding no other restriction on state operated television than that imposed by federal regulation, the Court has elevated "the Communications Act above the Constitution." Barnstone, supra, 514 F.Supp. at 686. Moreover, the couirt has abdicated its duty in an area in which the plaintiffs have no comparable remedy.

The freedom of expression protected by the First amendment encompasses the rights of both speakers and listeners. CBS, Inc.

v. FCC, 453 U.S. 367, 101 S.Ct. 2813, 2829, 69 L.Ed.2d 706 (1981); FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775, 800,m 98n S.Ct. 2096, 2114, 56 L.Ed. 2d 697 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77, 98 S.Ct. 1407, 1415-1416, 55 L.Ed.2d 707 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun., Inc., 425 u.S. 748 756, 96 S.Ct. 1817, 1822, 48 L.Ed.2d 346 (1976); Columbia Broadcasting System, Inc. v. Democratic National Commitee, 412 U.S. 94, 102, 93 s.Ct. 2080, 2086, 36 L.Ed.2d 772 (19730; Kleindinest v. Mandel, 408 U.S. 753, 762-63, 92 S.Ct. 2576, 2581-82, 33 L. Ed.2d 683 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 376, 386-90, 89 S.Ct.1794, 1804-1807, 23 L.Ed.2d 371 (1969); Stanley v. Georgia,394 u.S. 557, 564, 89 S.Ct. 1243, 1247, 22L.Ed.2d 542 (1969); Lamont v. Postmaster general, 381 U.S. 301, 305-07, 85 S.Ct. 14932, 1495-1497, 14 L.Ed.2d 398 d
(1965). As the Supreme Court unanimously held in Red Lion, supra:

> It is the right of the viewers and listeners, not the right of the broadcasters which is paramouint. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, andother ideas and experiences which is crucial here. That right may not constitutionally be abridged...

395 U.S. at 390, 89 S.Ct. at 1806 (citations omitted). The proper inquiry for this Court, then, should not be whether the Communications Act grants state broadcasters editorial discretion, but whether the Communications Act grants state broadcasters editorial discretion, but whether the

action of state officialls in these cases abridged free expression protected by the First Amendment. See Bellotti, supra.

Our system of constitutional protection clearly reflects that government may not restrict the free discussion of public issues on the basis of the political, religioius, or ideological content of the message. Freedom of expression concerning public issues 'is at the heart of the First Amendment's protection." First Nat'l Bank of Boston v. Bellotti, supra, 435 U.S. at 776, 98 S.Ct. at 1415; Mills v. Alabama, 384 U.S. 214, 218, 86 s.Ct. 1434,1436, 16 L.Ed.2d 484 (1966); Garrison v. Louisiana, 379 u.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1946) ("speech concerning public affairs is more than self expression itis the essence of self government"). Self-government suffers when those in power suppress competing views on public issues. Bellotti, supra, 435 u.S. at 777 n.

12, 98 S.Ct. at 1416 n.12. As a result, kfederal courts have consistently struck down content-based restrictions on the discussion of public issues. Carey v. Brown, k447 U.S. 455, 100 s.Ct. 2286, 65 L.Ed.2d 263 (1980) (statute which prohibited all peaceful picketing except for labor pickets impermissibly discriminated between lawful and unlawful activity on the basis of the content of the demonstrator's communication); First National Bank of Boston v. Bellotti, supra, (statute which prevented corporate expression on tax issue); Virginia State Board of Pharmacy v. Va. Citizens, supra, (invalidating prohibition on dissemination of over-the-counter drug prices); Police Dept. of the City of Chicago v. Mosley, 33 L.Ed.2d 212 (1972) (invalidating picketing); Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) (invalidating prohibition against discussion of political candidates on the

REAVLEY, Circuit Judge, dissenting:

I cannot join the majority or concurring opinions for the reason that each of these television stations does far more than tranmit expressions of the state. Our desire to free non-profit public broadcasting from judicial interference is no justification for pretending that the state is not relaying messages into the idea marketplace. I must conclude that the state encounters the First Amendment requirement of neutrality for reason generally discussed in my original panel concurrence. Barnstone v. University of Houston, KUHT-TV, 660 F.2d 137, 138 (5th Cir. 1981).

On the other hand, I would not go so far as Judge Johnson does to make the state decision presumptively unconstitutional whe ever a program s not shown "because of its substantive content." State operated television stations should be given more latitude, even to choose on the basis of substantive content, in their program selection. They should be entitled to pursue excellence, to build viewing audiences, to

respond to what viewers want, and to consider the effect of their programs upon that audience. Bona fide programming decisions would not, for me, violate First Amendment neutrality. Only if the decision to show or not to show were based upon viewpoint alone, in juxtaposition to the personal viewpoint of the programming authority or state superiors, entirely aside from any opinion as to program value or effect, would I regard neutrality abused and court justifiable.*

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*The recent opinion of a plurality of the Supreme Court in Board of Educ. v. Pico, --U.S.--, 102 S.Ct. 2799, 73 L.Ed.2d. 435 (1982), supports the analysis offered here and inmy separate opinion in Barnstone. The plurality reaffirmed that government action intended to suppress viewpoints with which the government disagrees offends the First Amendment, and also confirmed the distinction between "content" discrimination and "viewpoint" suppression which I offer here.

> [Government officials] rightly-possess significant discretion to determine the content of their school libaries. But that discretion may not be exercised in a narrowly partisan or political manner... Our Constitution does not permit the official suppression of ideas. Thus whether petitioners' removal of books from their school library denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intentde by their removal decision to deny respondent acess to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' de-

GARWOOD, Circuit Judge, concurring.

I concur in the majority opinion, and append these remarks only to point up two additional unrrelated matters I belive significant.

First, plaintiffs are not attacking governmental "public" broadcasting as such. Nor do they seek to require its operation to be on a pure "open forum" basis-like an empyt stage available to all comers-where each citizen can cause the broadcast of his or her program of choice, with the inevitable selectivity determined by completely content neutral factors such as lot, or first come first serve or the like.[1]

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cision, then petitioners have exercised their discretion in violation of the Constitution. --U.S. at --, 102 S.Ct at 2810 (footnote omitted) (citing MT. HEALTHY CITY BORAD OF EDUC. V. DOYLE, 429 U.S. 274, 287, 97, S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); compare Barnstone, 660 F.2d at 141 & n.11 (concurring opinion).
Moreoverr, for the reasons I have already explained, see 660 F.2d at 141 n.9, I believe that the factual differences between this case and Pico make this an even stronger case for the application of the First Amendment.

1. Nor do plaintiffs claim that they were denied any right or privilege which the stations granted any other citizen similarly situated.

Rather, plainitiffs seek to become a part of governmental "public" broadcasting essentially as it is, execpt they want it to broadcast this particular program of their choice. However, there is simply no way for them-together with all other who might wish to assert similar rights for their favorite "dramatization" -to become a part of such "conventional" (as distinguished from pure "open forum") governmental broadcasting except on the basis of governmental selection of the individual programs.

As the majority opinion covincingly demonstrates, in television broadcasting not only is selection inevitable, but it is likewise inevitable that in numerous inistances it will be largely based on factors that are not content neutral and on considerations that involve sympathy for or hostility to the program's "message" on the part of the party having the power of selection.2

This is not to say that program selection influenced by "message" sympathy or hostility on the part of governmental television stations is a desirable phenomenon, or even one which is wholly consistent with the values underlying the First Amendment. But such a characteristic is part and parcel of the operation of the conventional (not pure "open forum") governmental televison stations of which plaintiffs seek to avail themselves. They are not entitled to have a special exception made in their favor so that for this particular program they are

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2. In my view, the level at which a particular television programming decision is make, just as the question of whether it is made by failure to initially select or by cancellation, is relevant here only in the sense of possibly being evidentiary of whether the decision is made on the basis of sympathy for hostility to the program meessage or for some similar "political" type reason. In the context of these governmental stations broadcasting to the general public, I do not think it is of constitutional significance that the "sympathy" or "politics" influncing the decision is that of the program director or the university public affairs director or the station borard of directors, when all are acting as governmental personnel.

entitled to make the selection and require that these conventionally operated governmental stations broadcast it.

In contrast to a pure "open forum" system where diverse individual members of the public (and perhaps third-party producers) in effect select the programs and be considered the speakers, in conventional broadcasting the power of selection rests with the station (or party controlling it) and in substance it is the speaker. When a governmental unit controls a conventionally operated station, it is the speaker and speaks either in its corporate capacity or as a kind of proxy for the full body of its citizens. In an isolated instance, to grant an individual the right to require such a station to broadcast a particular program meerely because the station rejected it for "pollitical" type considerations, is, in effect, to force the governmental unit-in

either its corporate or more general representative capacity-to speak in a certain way and to forgo other speech it would have engaged in. To grant such a right on a consitent and through basis is to necessarily transform the station into one operated essentially on an "open forum" basis.

In the second place, plaintiffs do not assert that the stations in question have, on the basis of their agreement or disagreement with the different points of view involved or for similar "political" type reasons, structured their programming so that it constitutes a one-sided or slanted presentation of any matter of public concern, importance or controversy, whether relevant to the "message" of plaintiffs' desired program or otherwise. So far as any such matters

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3. And plaintiffs do not contend their particular (or some similar) program must be shown to fairly balance the presentation on this subject matter which the stations have improperly slanted by showing some improperly slanted by showing some other program or programs.

are concerned, plaintiffs' complaint is made essentially in a vacum-they claim that merely because on one particular occasion a "political" type decision was made not to air one specific program plintiffs wished to see, they therefore have a right to a court order directing these conventionally operated governmental stations to promptly air this precise program. We have rejected this claim. This is not to say, however, that no private citizen has a right to question the programming of governmental "public" television stations under any circumstances, or that the remedy of complaint to the F.C.C. will always be adequate.

A private citizen has noconstitutional right to force a conventionally operated governmental "public" television station to enter with its broadcasting a particular propaganda war by showing a specific program selected by the citizen. Whether it is proper for such a governmental station to

enter that kind of a war at all, or whether if it does so it may nevertheless present only one side while refusing, for reasons of a "political" nature, to broadcast any competing view, are questions of a different nature that are not now before us.